No. 02-749 Status: ARGUED

Title: Raytheon Company, Petitioner
v.
Joel Hernandez

Docketed: November 15, 2002
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-15512)
Decision Date: June 11, 2002
Rehearing Denied: August 12, 2002

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 12 2002	Petition for writ of certiorari filed. (Response due December 16, 2002)
Dec 13 2002	Motion for leave to file amicus brief filed by Equal Employment Advisory Council.
Dec 16 2002	Order extending time to file response to petition to and including January 15, 2003.
Jan 16 2003	Order further extending time to file response to petition to and including January 24, 2003.
Jan 24 2003	Brief of respondent Joel Hernandez in opposition filed.
Feb 3 2003	Reply of petitioner Raytheon Company filed.
Feb 5 2003	Lodging consisting of twelve copies of lower court material received from counsel for the petitioner and distributed.
Feb 24 2003	Motion for leave to file amicus brief filed by Equal Employment Advisory Council GRANTED. Justice Breyer took no part in the consideration or decision of this petition.
Feb 24 2003	Petition GRANTED Justice Breyer took no part in the consideration or decision of this petition.
Mar 12 2003	Extension of time to file the joint appendix and petitioner's brief on the merits to and including May 9, 2003.
May 9 2003	Joint appendix filed.
May 9 2003	Brief of petitioner Raytheon Company filed.
May 9 2003	Brief amicus curiae of United States filed.
May 9 2003	Brief amicus curiae of Equal Employment Advisory Council, et al. filed.
May 21 2003	Extension of time within which to file respondent's brief on the merits to and including July 9, 2003.
May 21 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 7 2003	SET FOR ARGUMENT October 8, 2003.
Jul 9 2003	Brief amici curiae of National Employment Lawyers Association , et al.filed.
Jul 9 2003	Further extension of time to file respondent's brief on the merits to and including July 16, 2003.
Jul 9 2003	Brief amici curiae of Betty Ford Center, et al. filed. (Distributed)
Jul 11 2003	CIRCULATED.
Jul 16 2003	Brief of respondent Joel Hernandez filed. (Distributed).
Jul 31 2003	Record received from the U.S.D.C. for the District of Arizona. (1 envelope)
Jul 31 2003	Record received from the U.S.C.A. 9th Circuit. (1 envelope)
Aug 4 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae

	and for divided argument GRANTED. Justice Breyer took no part in the consideration or decision of this motion.
Aug 20 2003	Reply of petitioner Raytheon Company filed. (Distributed)
Oct 8 2003	Argued. For Petitioner: Carter G. Phillips, and for the United States, as amicus curiae, Paul D. Cement, Deputy Solicitor General. For Respondent: Stephen G. Montoya. Justice Souter and Justice Breyer not participating.

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No. 02-

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IN THE

Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Americans with Disabilities Act confers preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use.

PARTIES TO THE PROCEEDING

Joel Hernandez, the plaintiff in the trial court and the respondent here, formerly was employed by, and later sued, Hughes Missile Systems Company, a subsidiary of Hughes Aircraft Company. (As noted in the Corporate Disclosure Statement, Raytheon Company subsequently purchased Hughes Aircraft Company and its subsidiaries.)

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Petitioner Raytheon Company states that it purchased defendant-petitioner Hughes Aircraft Company (and, with it, the subsidiary Hughes Missile Systems Company). Raytheon Company has no parent corporation and no publicly held company owns 10% or more of its stock.

Neither Hughes Electronics Corporation (Hughes Aircraft Company's former parent) nor General Motors Corporation (formerly part owner of Hughes Electronics Corporation) has any financial interest in this litigation.

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Petitioner[1] respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Hernandez v. Hughes Missile Systems Co.*, 298 F.3d 1030 (9th Cir. 2002).

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Ninth Circuit in this case, dated June 11, 2002, is not reported, but is reproduced at 2002 U.S. App. LEXIS 16163 and in the Appendix ("Pet. App.") at 1a-13a. In response to a petition for rehearing, the panel amended its initial opinion; that amendment is reproduced at Pet. App. 14a, and the opinion as amended is reported at 298 F.3d 1030. The order of the district court granting the Company's motion for summary judgment is unreported and reproduced at Pet. App. 16a-17a.

STATEMENT OF JURISDICTION

Jurisdiction existed in the district court under 28 U.S.C. § 1331. The court of appeals' initial panel opinion was issued on June 11, 2002. A timely petition for rehearing and suggestion for rehearing *en banc* was filed. The panel denied the rehearing petition but issued its amended opinion on August 11, 2002. The suggestion for rehearing *en banc* was denied the same day. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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1. As noted in the Corporate Disclosure Statement, Hughes Missile Systems Company was acquired by Raytheon Company. Respondent Hernandez worked at and sought rehire by Hughes before the Raytheon acquisition, so the petitioner here is designated as "Hughes" or "the Company" throughout.

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act is codified at 42 U.S.C. §§ 12101-12213. The relevant provisions of the Act are reproduced at Pet. App. 19a.

STATEMENT OF THE CASE

1. Respondent Joel Hernandez formerly worked for Hughes, most recently as a calibration technician. Hernandez worked on missile systems sold to the U.S. government. Hernandez's job performance generally was acceptable, although he nearly had been terminated for absenteeism in 1986. Hernandez attributed his absences then to alcoholism. He completed a program of alcohol rehabilitation, and he was allowed to remain at work.

About five years later, in July 1991, Hernandez reported for work exhibiting signs of substance abuse. Hernandez was given a drug test. He tested positive for cocaine. Hughes' policy at the time provided for the discharge of any employee "testing positive for . . . drugs on a test requested by the Company." Pet. App. 7a. The Company therefore gave Hernandez a choice: resign or be terminated. Hernandez chose to resign. Upon his departure, the Company noted in Hernandez's personnel file that he had "quit in lieu of discharge . . . for personal conduct." *Id.* at 4a.[2]

2. Although Hernandez's departure in 1991 was at least technically a resignation, "[t]here is no question that Hughes applied this policy [against re-employment of those terminated for misconduct] in rejecting Hernandez's application." Pet. App. 12a n.17. Because Hernandez's 1991 resignation came only in the face of impending termination, the parties and the courts below treated his departure as an involuntary discharge. For purposes of this petition, the Company does so as well.

2. The Company had (and still has) a "policy against rehiring former employees who were terminated for any violation of its misconduct rules." Pet. App. 11a. In 1994, Hernandez reapplied for a job with Hughes.[3] The application was forwarded to Hughes' Labor Relations Department. Because the application indicated that Hernandez previously had worked for Hughes, the responsible Labor Relations employee pulled Hernandez's personnel file, noted that he had "quit in lieu of discharge," and summarily rejected the application.

3. Hernandez filed an administrative charge of discrimination, and subsequently this lawsuit, alleging a violation of the Americans with Disabilities Act ("ADA"). Hernandez did not challenge his 1991 termination, did not assert that he had a "disability" within the meaning of the statute at the time of his termination, and did not claim that, when he reapplied to work at Hughes, he suffered from any physical or mental condition that might impair his ability to engage in any major life activity.

Rather, Hernandez claimed that, at the time his reapplication was rejected, he had a "record of . . . an impairment," 42 U.S.C. § 12102(2)(B), and/or that Hughes "regarded [him] as" having an impairment, *id.* § 12102(2)(C). Hernandez contended that his drug use was causally related to an addiction (from which he since had been rehabilitated). Hughes, he alleged, relied on that "record of an impairment" to deny him a job in 1994. Thus,

3. Hernandez filed his application with two letters of reference, one from his pastor, and another from a counselor who said that Hernandez attends Alcoholics Anonymous meetings regularly. Neither the application nor the reference letters spoke of drug use or drug rehabilitation.

Hernandez argued, Hughes acted unlawfully when it applied to him its facially neutral rehire-disqualification policy. According to Hernandez, his drug addiction (though warranting his *discharge* in 1991) bolstered his *application for rehire* in 1994.

4. The district court rejected this argument and granted Hughes' motion for summary judgment.

5. A panel of the Ninth Circuit (per Reinhardt, J.) reversed. The court acknowledged that when Hernandez was terminated in 1991, he was not a "person with a disability" protected by the ADA. Indeed, the court conceded, Congress in 42 U.S.C. § 12114 had expressly *excluded* "current" drug users from ADA coverage. Pet. App. 5a-6a. The court observed, however, that once Hernandez completed rehabilitation (which Hernandez claimed to have done after leaving Hughes), evidence in Hughes' files of his prior drug use (which then was not a statutorily covered "disability") nonetheless gave him a "record" of a disability, entitling him to the protection of the Act when he applied for reemployment in 1994.

The court thus concluded that the ADA confers preferential treatment upon individuals who are fired for drug-related misconduct. Hughes, the court allowed, was entitled to reject summarily any application for employment submitted by an individual previously fired for most forms of misconduct. If, however, the prior misconduct was in some fashion related to illegal drugs, then the ADA confers preferential rehire rights, in the form of a second chance:

> . . . Hughes's . . . policy against rehiring former employees who were terminated for any violation of its misconduct rules, although lawful on its face, *violates the ADA as applied to former drug addicts whose only work-related offense was testing positive [for drug use but] ha[ve] been successfully rehabilitated. . . .*

Pet. App. 11a (emphasis added).

REASONS FOR GRANTING THE PETITION

The Company respectfully suggests that this Court should grant *certiorari* and summarily reverse, or, in the alternative, set the case for plenary briefing and argument.[4]

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4. Reinstating the summary judgment would terminate the case, and thus review now is ripe. *See US Airways, Inc. v. Barnett*, __ U.S. __, 122 S. Ct. 1516 (2002) (granting employer's petition for *certiorari* following appellate court's reversal of summary judgment for employer in ADA action); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (same); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (same); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) (granting *certiorari* following reversed summary judgment in securities fraud suit brought by respondents). Moreover, this case in particular is not one that would profit by any further factual development; indeed (if the Ninth Circuit's opinion were to stand) there would be little if anything left to try. The Ninth Circuit correctly noted that "[t]here is no question that Hughes applied th[e] [no-rehire] policy in rejecting Hernandez's application." Pet. App. 12a n.17. Whether such a policy is lawful is what this case is about, and that question is squarely presented now; the Company's defense on the merits lies in the text of the ADA and the cases interpreting it, not on further facts that might be elicited at a trial. Review by this Court therefore ought not be deferred until any later time. *See United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964).

I. THE DECISION BELOW IGNORES DIRECTLY APPLICABLE STATUTORY LANGUAGE AND CREATES A CONFLICT IN THE COURTS OF APPEALS ON A RECURRING QUESTION OF FEDERAL LAW

Many companies disqualify discharged persons from rehire. Such a no-rehire rule provides an essential form of institutional memory to help ensure that failed former employees do not slip back into an organization simply because hiring personnel do not know (or have forgotten) why former employees earlier departed. No-rehire rules are particularly common where: (i) the employer's business involves hazardous materials, confidential information, or particularly demanding job requirements (here, for example, the Company contracts with the U.S. Government to build missile systems); and (ii) the misconduct leading to the termination was aggravated (here, for example, illegal cocaine use).

The Ninth Circuit's decision draws into question the validity of these no-rehire rules. As shown below, the decision:

- Cannot be reconciled with the ADA's text, or with this Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002);
- Conflicts directly with circuit cases upholding similar no-rehire rules; and
- Departs from long lines of appellate decisions that hold that (i) employee misconduct lawfully may be the subject of discipline, even when causally related to a disability, and (ii) the ADA does not require that persons with disabilities be given a "second chance" not available to others.

A. The Decision Conflicts With The Text Of The ADA, And With This Court's Decision In *Williams*.

Congress in enacting the ADA took pains not to give special rights to drug users.[5] To ensure that the Act would not be used as a safe harbor for those who use illegal drugs or provide an excuse for drug-related misconduct, Congress addressed the issue directly in the statute's text. Specifically, the Act: (i) defines the term "qualified individual with a disability" to *exclude* those currently using illegal drugs; (ii) expressly authorizes employers to prohibit the use of illegal drugs on the job, and to prohibit employees from arriving at work with drugs in their systems; and (iii) expressly permits employers to apply uniform "qualification standards for employment" and uniform standards for "job performance and behavior [to those who engage in the use of illegal drugs] even if [the] unsatisfactory performance or behavior is related to . . . drug use. . . ." 42 U.S.C. §§ 12114(c)(1), (2) & (4). Thus, when an employer takes action against "any employee or applicant" because of behavior "related to . . . drug use," it acts lawfully. *Id.* § 12114(a).

At Hughes (like thousands of U.S. companies), persons engaging in aggravated work-related misconduct face two

5. *See, e.g.*, 135 Cong. Rec. S11224-01, S11225, 101st Cong. 1st Sess. (September 15, 1989) (statement of Sen. Harkin) (addressing an amendment to the bill specifically added to address concerns regarding the application of the ADA to drug addicts), *reprinted in* 1990 U.S.C.C.A.N. 303, 359-60 (1990).

consequences. First, the individual is fired. Second, the individual loses the right to be considered for subsequent employment. Theft is treated this way, whether it stems from greed or kleptomania. Workplace assault is treated this way, whether it stems from poor judgment or from bipolar disorder. Drug use is treated this way also: Hughes does not tolerate workers who arrive to work with cocaine in their systems, whether the drug use is "recreational" or habitual.

Thus, to Hughes (and to Congress in enacting the ADA), it was irrelevant whether or not Hernandez's 1991 drug use stemmed from an alleged addiction. Hernandez would have been fired, and he would have been barred from reemployment, regardless of the frequency or cause of his decision(s) to use cocaine. When Hernandez was discharged for testing positive for cocaine while on the job, Hughes held him "to the same standards [of] . . . behavior that [it uniformly applied] to other employees [even though the specific kind of] behavior [in which he engaged was] related to . . . drug use." 42 U.S.C. § 12114(c)(1). And when it subsequently rejected Herndandez's application for prior, terminable misbehavior, it merely enforced its no-rehire rule, a "qualification standard[] for employment . . . that [it applies] to other" employees who seek to be rehired, regardless of the nature of the prior misbehavior. *Id.* § 12114(c)(4).

The court of appeals did not refer to the controlling statutory language. The court acknowledged that the lawfulness of the original termination was not at issue, Pet. App. 5a n.7, but simply ignored the implication of § 12114 for the *second* consequence that followed from Hernandez's misconduct: lawful disqualification from future employment. Hughes was entitled to treat Hernandez in a nondiscriminatory way, to impose in his case precisely the

same sanction applicable to any other form of serious misbehavior. The ADA promises nondiscrimination; it does not promise to insulate drug abusers from the consequences of their misconduct. Because (as the statute says) an employer may apply the same standards and impose the same sanctions for drug-related misconduct as it does to other sorts of misconduct — even if there is a disability lurking in the background — the Ninth Circuit's opinion is demonstrably wrong.[6]

---

6. Ironically, if anyone erroneously "regarded [Hernandez] as" a person with a disability, it was the Ninth Circuit itself, in treating drug addition as a categorical disability in violation of the rule in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). *Williams* taught that whether someone has a statutory disability turns, not on labels, but on a detailed, person-specific analysis of whether an individual is substantially limited in a major life activity. *Id.* at 196-99. The Ninth Circuit here failed to heed the teaching of *Williams*. The court assumed that, because Hernandez was an addict, he necessarily had a statutory disability (and, thereafter, that he was "regarded as" having had one). Pet. App. 6a n.9. But this is not so. Hernandez did not have a covered disability in 1991 when he was fired. 42 U.S.C. § 12114(c)(1). And the court undertook no analysis of whether, at the time Hernandez reapplied (or at any other time), he was impaired in any major life activity. The court of appeals evidently believed that this analysis was unnecessary because of its holding that the Company "regarded [Hernandez] as" having a disability. *Id.* But the court made two analytical errors. First, Hughes did not "regard [Hernandez] as" anything other than what he was: a person ineligible for rehire because of prior misconduct. Second, even if it were true that the Company "regarded [Hernandez] as" a former *drug addict*, that would not end the inquiry, because one can determine whether an "addiction" (or any other condition or disease) is a "disability" only by conducting the kind of person-specific analysis that *Williams* mandated. The Ninth Circuit's treatment of the issue thus conflicts with *Williams* and other cases that correctly

(Cont'd)

B. The Decision Creates A Conflict In The Circuits On The Validity Of No-Rehire Rules.

The Ninth Circuit's decision directly conflicts with several others. In *Harris v. Polk County*, 103 F.3d 696 (8th Cir. 1996), for example, the plaintiff alleged that she had a mental illness that proximately caused the shoplifting incident for which she had been terminated. *Id.* When she applied for reemployment, the employer summarily rejected the application because, as a matter of "office policy," it refused to hire individuals known to have been guilty of unlawful conduct. *Id.* at 696. Rejecting the plaintiff's argument that the ADA sheltered her from the consequences of her disability-related misconduct, the Eighth Circuit observed that "an employer [must be able to] hold disabled employees to the same standard of law-abiding conduct as all other employees." *Id.* at 697.

Similarly, in *Johnson v. New York Hospital*, 1999 U.S. App. LEXIS 20151 (2d Cir. Aug. 20, 1999), the plaintiff had been terminated from his job for assaulting other employees while he was off duty. The plaintiff attributed his misconduct

(Cont'd)
require the plaintiff to prove that he or she had (or was regarded as having) an *actual disability*. *See, e.g., Burch v. Coca-Cola Co.*, 119 F.3d 305, 315-316 & 318 n.16 (5th Cir. 1997) (plaintiff's status as alcoholic is not sufficient to warrant a finding of disability, which requires an individualized inquiry into the impact on the plaintiff's major life functions), *cert. denied*, 522 U.S. 1084 (1998); 29 C.F.R. App. § 1630.2(k) (a "record of an impairment" violation exists only if "the record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities.").

to a disability. When he reapplied for a job, the employer rejected him, citing its "policy of not rehiring any employee who has been discharged." *Id.* at *2. The Second Circuit rejected the notion that the ADA immunized the plaintiff from the consequences of his misconduct or mandated special exceptions for conduct that may have a nexus to a disability.

Flynn v. Raytheon Co., 94 F.3d 640, 1996 U.S. App. LEXIS 20837 (1st Cir. 1996) (unpublished opinion), *aff'g* 868 F. Supp. 383 (D. Mass. 1994), is almost precisely on point (and coincidentally involves petitioner here). In *Flynn*, the plaintiff was fired for reporting to work under the influence of alcohol. The plaintiff did not dispute that the discharge was lawful; rather, he sued over Raytheon's decision not to consider him for reinstatement or rehire. But the First Circuit affirmed summary judgment, noting that

> the ADA does not require an employer to rehire a former employee who was lawfully discharged for repeated disability-related failures to meet its legitimate job requirements, *viz.*, punctuality and sobriety. . . . Flynn cites no authority for his claim that the ADA entitles him to a "second chance" to meet Raytheon's legitimate work requirements. . . .

Id. at *4-5.

Numerous other cases are to the same effect. *E.g., Peyton v. Otis Elevator Co.*, 72 F. Supp. 2d 915, 920 (N.D. Ill. 1999) (plaintiff was fired for alcohol-related absences; plaintiff then unsuccessfully applied for rehire; § 12114(c)(4) "precludes [any ADA claim] because it does not require an employer to give any special concessions to misconduct caused by drugs or alcohol"); *Thomas v. Mississippi State Dep't of Health*, 934 F. Supp. 768, 773 (S.D. Miss. 1996) (plaintiff was

terminated for use of crack cocaine; a disability discrimination claim based on a denial of rehire was "completely undermined by § 12114(c)(4)"); *cf. Martin v. Barnesville Exempted Village Sch. Dist.*, 209 F.3d 931, 935 (6th Cir.) (plaintiff, a custodian at a public school, was seen drinking alcohol on the job; he subsequently sought and was denied a position as bus driver; the court rejected as "absurd on its face" the notion that the ADA required the school district to give the plaintiff the position; "ADA does not protect plaintiff from [the consequences of] his own bad judgment in drinking on the job"), *cert. denied*, 531 U.S. 992 (2000).[7]

And the conflict in the circuits runs deeper even than that. Two lines of cases are implicated. The first establishes that employers have the right to articulate and enforce generally applicable rules of conduct, and to discipline or terminate employees for violating those rules, without running afoul of the ADA. Put differently, a plaintiff does not secure ADA protection by saying, "a disability made me do it":

- *Maddox v. University of Tenn.*, 62 F.3d 843 (6th Cir. 1995) — An assistant football coach was fired after he was arrested for public intoxication and driving under the influence of alcohol. The plaintiff alleged he was terminated because of his disability of

7. Judge Reinhardt's opinion here even departs from prior (unpublished) Ninth Circuit precedent. In *Caniano v. Johnson Controls*, 1999 U.S. App. LEXIS 20648 (9th Cir. Aug. 26, 1999), plaintiff was terminated following a long string of absences. After the termination, he attributed his absences to a disability, dysthemia, and asked to be reinstated or rehired. The Ninth Circuit declined to read the ADA to require an employer "to rehire a legitimately terminated employee upon the employee's demonstration that he [now] could perform the job" satisfactorily. *Id.* at *4.

alcoholism, but the Sixth Circuit drew a distinction between employment actions based on *behavior* and those based on *disability*. Alcoholism may have compelled the plaintiff to drink, the court observed, but it did not compel him to drive.

- *Pernice v. City of Chicago*, 237 F.3d 783 (7th Cir. 2001) — The plaintiff was arrested for possession of cocaine and disorderly conduct, and was discharged. The Seventh Circuit held that an employer can terminate an employee for violations of valid work rules that apply to all of its employees, even if the employee's violation of the rule occurred because of a disability.

- *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662 (7th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001) — A doctor was terminated after patients and other doctors complained to the employer that she smelled of alcohol and had glassy eyes on numerous occasions. The doctor denied that she had been drinking on the job, and she alleged that her employer regarded her as having a disability — alcoholism. Whatever her disability status, the court held, her breach of the employer's rules justified her termination.

- *Taub v. Frank*, 957 F.2d 8 (1st Cir. 1992) (Rehabilitation Act case) — The plaintiff was arrested for heroin possession with intent to distribute and was terminated. The plaintiff claimed he had a drug addiction, which led to his heroin possession, and argued that his termination therefore was unlawful. The First Circuit held that, disability or no, the Postal

> Service was entitled to enforce uniformly its rule that employees be of "good character and reputation" and to prohibit employees from engaging in "criminal conduct."

These cases all confirm that an employer is not obligated to "give any special concessions to misconduct caused by drugs or alcohol." *Peyton*, 72 F. Supp. 2d at 920. The decision below is to the contrary.

Juxtapose that line of ADA cases against a second line, which holds that a "second chance," after once failing to meet the rules of workplace deportment, is not a reasonable accommodation for a person with a disability. *E.g.*, *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666-67 (7th Cir. 1995) ("Siefken is not asking for an accommodation; . . . [h]e is asking for another chance. . . . But the ADA does not require this."); *Burch*, 119 F.3d at 320 (the employer need not grant a second chance to a person guilty of alcohol-related misconduct); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (the plaintiff was discharged for sleeping on the job, which she said was brought on by medication for her disability; the ADA does not require giving the employee a "second chance" to conform to the employer's rules), *cert. denied*, 528 U.S. 1137 (2000); *Burroughs v. City of Springfield*, 163 F.3d 505, 507 (8th Cir. 1998) (plaintiff became dysfunctional due to seizures that resulted from his failure to take his medication; "Burroughs failed to meet th[e] [employer's] legitimate expectation . . . , and the ADA does not require the City to provide him another chance. . . .").

Taken together, these two lines of cases establish that an employer need not: (i) tolerate in the first instance; or (ii) provide a "second chance" for, drug-related (or other) misconduct, even where the misconduct was related to a disability. The Ninth Circuit's decision here cannot be reconciled with these lines of cases. The Ninth Circuit here has held that an individual lawfully terminated for misconduct can use the ADA to secure preferential treatment, in the form of just such a second chance. But the right to terminate means nothing if the terminated employee can wait — a week, a month, a year, or a decade — and conjure up an ADA violation by the simple expedient of filing a new job application. The ADA does not require employers to abide that sort of revolving door.[8]

II. THIS CASE IS APPROPRIATE FOR SUMMARY REVERSAL

This case warrants consideration for summary reversal.[9] There is no substantial doubt that the Ninth Circuit's decision was wrong. It contravenes the express language of the ADA, upsets the evident intention of Congress in enacting the law, and conflicts with substantial contrary authority.

---

8. This case thus has precedential significance well beyond the context of drug-related misconduct. It will be cited as conferring statutory "second chance" rights on individuals who are guilty of a wide range of misconduct, as long as they are able to suggest that the misconduct was attributable to a disability of some sort.

9. Sup. Ct. R. 16.1. The Court has used summary reversal to decide cases that involve (i) well-settled law; (ii) undisputed facts; and/or (iii) a clearly erroneous lower court decision. *See, e.g.*, *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (summarily reversing where opinion below "cannot remotely" be reconciled with what "[the Court's] cases require"); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 505, 510 (2001) (summarily reversing where decision below was "baffling" and "conflict[ed] with [this Court's] cases"); *Ohio v. Reiner*, 532 U.S. 17, 18 (2001) (summarily reversing where the facts were clear and the Court's "precedents dictate" reversal).

Summary treatment is particularly appropriate because two distinct grounds for summary judgment exist. First, as shown above, nothing in the ADA prohibits employers from applying no-rehire rules to persons guilty of substantial workplace misconduct. Second, the Company was entitled to summary judgment on a narrower ground. Whatever may be the lawfulness of no-rehire rules in general, it is undisputed that the person who enforced the no-rehire rule in Hernandez's case *did not know*: (i) what kind of misconduct Hernandez had committed when he was discharged in 1991; or (ii) that Hernandez had been addicted to drugs. Pet. App. 7a-8a. Because the decisionmaker did not know of his addiction, it is analytically impossible for her to have engaged in disparate treatment based on that addiction.[10] *Cf. Breeden*, 532 U.S. at 273 (summarily reversing the Ninth Circuit; it is analytically impossible to retaliate based on something not known at the time the adverse employment decision is made). But Judge Reinhardt's opinion here declared that the decisionmaker's ignorance of the facts underlying Hernandez's termination was *itself* a violation of the ADA:

> If [the decisionmaker] in fact did not know the reasons for Hernandez's "termination," *her lack of knowledge would have been due solely to Hughes's unlawful policy which shields its employees from the knowledge that an employment decision may be illegal.* Maintaining a blanket policy against rehire of *all* former

10. Hernandez stated only a claim for disparate treatment. He attempted to assert an adverse impact theory for the first time in his summary judgment papers, but the district court and the court of appeals both rejected that attempt as untimely. Pet. App. 13a n.20. The court of appeals evaluated Hernandez's claim as one alleging disparate treatment only.

> employees who violated company policy . . . may well result, as Hughes contends it did here, in the staff member who makes the employment decision remaining unaware of the "disability" and thus of the fact that she is committing an unlawful act. *Having willfully induced ignorance on the part of its employees who make hiring decisions, an employer may not avoid responsibility for its violation of the ADA by seeking to rely on that lack of knowledge.*

Pet. App. 12a (first and third emphasis added).

Until now, no case had ever held that employers should (let alone were statutorily obliged to) inform decisionmakers of employees' sensitive personal information. Indeed, the ADA itself elsewhere teaches that employers should *limit* access to information about the disabilities of employees to the greatest degree possible. *See, e.g.*, 42 U.S.C. § 12112(d)(3) (obligating employers to segregate, in a separate file, any "information obtained regarding the medical condition" of an applicant, and severely limit the access of management employees to the information in those medical files).

In sum, whether it be on the narrow ground that the decisionmaker did not know of the (alleged) disability, or on the broader ground that the ADA does not confer on drug users an exception from generally applicable no-rehire rules, the Ninth Circuit's decision is startling, and plainly wrong.

CONCLUSION

The Court should grant the petition for *certiorari* and consider summary reversal of the court of appeals.

Respectfully submitted.

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APPENDIX

APPENDIX A — OPINION, ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 11, 2002 AND AMENDED AUGUST 12, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-15512

D.C. No.
CV-98-00319-JMR

JOEL HERNANDEZ,

Plaintiff-Appellant,

v.

HUGHES MISSILE SYSTEMS COMPANY, an Arizona corporation;
HUGHES AIRCRAFT COMPANY, a Delaware corporation;
RAYTHEON COMPANY, a Delaware corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted
February 14, 2002—San Francisco, California

Filed June 11, 2002

Appendix A

Before: Stephen Reinhardt, Frank Magill* and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Reinhardt

OPINION

REINHARDT, Circuit Judge:

In July 1991, Plaintiff Joel Hernandez was given a drug test at his place of employment and tested positive for cocaine. He had worked for the Defendant, Hughes Missile Systems Company ("Hughes")[1] for approximately twenty-five years, first as a janitor, and at the time of his positive drug test, as a Calibration Service Technician. Hughes was also aware at this time that Hernandez struggled with an alcohol problem. Rather than being terminated, Hernandez was given the option to resign in lieu of termination, which he chose to do. On the "Employee Separation Summary" filled out at the time of his resignation, was the handwritten note that Hernandez "quit in lieu of discharge" and that the reason for his leaving was "discharge for personal conduct."

Over two years passed and on January 24, 1994, Hernandez applied to be rehired by Hughes as a Calibration

* The Honorable Frank Magill, United States Circuit Judge for the Eighth Circuit, sitting by designation.

1. Hughes Missile Systems Company has been acquired by Raytheon Company. For the sake of continuity, we will refer to the Defendant as "Hughes."

Appendix A

Service Technician or a Product Test Specialist.[2] Hughes rejected the application. Subsequently, in June 1994, Hernandez filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging that his application was rejected because of his disability, specifically, because of his record of drug addiction. The EEOC issued a right to sue letter. Hernandez then filed this action under the Americans with Disabilities Act ("ADA") and the district court granted Hughes's motion for summary judgment. We reverse.

When Hernandez applied to be rehired, he attached to his application a copy of his resumé and two reference letters. The first letter was from a pastor of Hernandez's church. It stated that Hernandez was a "faithful and active member." The second letter was from John L. Lyman, M.S., a counselor who stated that he works with recovering alcoholics and that Hernandez attends A.A. regularly, maintains his sobriety, and has a strong commitment to his recovery. On his application, Hernandez checked the "yes" box in response to the question whether the applicant had previously worked for Hughes.[3]

Hernandez's application was forwarded to Hughes's Labor Relations Department where it was reviewed by Ms. Joanne Bockmiller. Because Hernandez indicated that he had previously worked for Hughes, Bockmiller testified in her deposition that she pulled his personnel file and reviewed his employee separation sheet. She stated

2. At that time, there were seven openings for the position of Product Test Specialist.

3. The application also asked, "If yes, when?" to which Hernandez replied "1991."

that once she saw that he "quit-in-lieu of discharge," he concluded that he was ineligible for rehire. Bockmiller testified that she made this decision based on the company's unwritten policy of not rehiring former employees whose employment ended due to termination or resignation in lieu of termination.[4] Bockmiller testified that at the time she made the decision not to rehire Hernandez, she did not know the grounds for, or the conduct underlying, his resignation.

Hughes submitted a statement to the EEOC in response to Hernandez's charge. On July 15, 1994, George Medina, Manager of Diversity Development for Hughes, wrote that "[Hernandez's] application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation." The letter went on to state that "[t]he Company maintains it's [sic] right to deny re-employment to employees terminated for violation of Company rules and regulations." On November 20, 1997, the EEOC issued a determination on the merits of Hernandez's complaint. The EEOC found "reasonable cause to believe that [Hernandez] was denied hire . . . because of his disability."[5]

4. It is not clear on the record before us the difference between "termination" and "resignation in lieu of termination." Although there may be a difference in terms of what former employees can report to future potential employers, for the purposes here—the rehiring of former employees—there appears to be no difference in Hughes's treatment of employees who were terminated as opposed to those who resigned under threat of termination.

5. The EEOC attempted to conciliate the dispute between the parties but to no avail. On June 22, 1998, the EEOC issued Hernandez a right to sue letter.

Following Hernandez's filing of this action on July 6, 1998, Hughes asserted that he had failed to make a *prima facie* case of discrimination. It further argued that even if he had established a *prima facie* case, he had failed to demonstrate that its proffered nondiscriminatory reason for not rehiring him was a pretext for discrimination. After hearing oral argument on Hughes's summary judgment motion, the district court granted it without any explanation of its reasons for doing so. Hernandez appealed.[6]

Hernandez argues that, in rejecting his application for rehire, Hughes discriminated against him on the basis of a disability in violation of Title I of the ADA.[7] *See* 42 U.S.C. § 12112 (2002). In order to establish a *prima facie* case of discrimination, a plaintiff must demonstrate that 1) he is disabled within the meaning of the ADA; 2) he is a qualified individual able to perform the essential functions of the job; and 3) his employer terminated or refused to rehire him because of his disability. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999). With regard to the first element, a "disability" under the ADA is defined as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

6. We review a grant of summary judgment *de novo*. *Humphrey v. Memorial Hosps. Assoc.*, 239 F.3d 1128, 1133 (9th Cir. 2001).

7. There is no question (nor does Hernandez raise one) regarding the propriety of his discharge in 1991 when he tested positive for cocaine. *See* § 12114(c); 29 C.F.R. § 1630.3(a); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 (9th Cir.1995).

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

§ 12102(2). Hernandez does not claim that he was actually disabled at the time he applied to be rehired by Hughes in 1994. Rather, he argues that he was not rehired because of his record of disability, and/or because he was regarded as being disabled.[8] *See* § 12102(2); *Thompson v. Davis*, 282 F.3d 780, 784 (9th Cir. 2002). Thus, in order to make a *prima facie* case, Hernandez must present sufficient evidence that he was not rehired by Hughes because of his record of drug addiction or because he was perceived as being a drug addict, as well as demonstrating that he is qualified for the position he seeks.[9]

8. The parties agree that Hernandez's claim of discrimination is limited to either a "regarded as" or a "record of" definition of disability.

9. Although it is possible that a drug *user* may not be "disabled" under the ADA if his drug use does not rise to the level of an addiction which substantially limits one or more of his major life activities, in this case, it is not disputed that Hernandez was a drug *addict* and that his positive drug test formed a record of his addiction. In other words, it is not disputed that Hernandez was "disabled" within the meaning of the ADA at the time he resigned in lieu of termination, and a record of that disability existed. *See* 28 C.F.R. § 35.104 ("The phrase physical or mental impairment includes . . . drug addiction, and alcoholism."); *Thompson v. Davis*, 282 F.3d 780, 784 (9th Cir. 2002) ("Drug addiction that substantially limits one or more major life activities is a recognized disability under the ADA."); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001) (stating that alcoholism is a protected disability under ADA); *Mararri v. WCI Steel, Inc.*, 130 F.3d 1180, 1185 (6th Cir. 1997) ("There is no dispute that alcoholism is a disability within the protection of the ADA.").

Hernandez points to Hughes's position statement to the EEOC as direct evidence that he was not rehired because of his record of drug addiction. As mentioned previously, in this statement Hughes wrote that "[Hernandez's] application was rejected based on his demonstrated drug use while previously employed." It also stated that Hernandez was discharged for violating Rule and Regulation No. 7 which states:

> Unauthorized or unlawful manufacture, distribution, dispensing, sale, possession, consumption, use or being under the influence of alcohol, a controlled substance or illegal drug during working time, while performing work for the Company or at any time on Company premises; or **testing positive for alcohol or drugs on a test requested by the Company.**

(emphasis in Hughes's original letter to the EEOC).

Hughes argues in response that its position statement was written by Mr. Medina, an employee who did not make the actual decision whether or not to rehire Hernandez, and that therefore we should consider only the testimony of Ms. Bockmiller, the employee who reviewed Hernandez's application. However, given the inferences that must be drawn in favor of the non-moving party, even Bockmiller's testimony does not unequivocally support Hughes's position that Hernandez failed to make a *prima facie* showing of discrimination. It is true that Bockmiller testified that she did not know of Hernandez's history of drug addiction or of the reason for his leaving the company in 1991. However, she also testified that at the time of her review she pulled

Hernandez's entire personnel file, which would have included the 1991 drug test results. She also stated that, although she did not remember what Hernandez attached to his application, she would have seen any materials he submitted, which included the letter from his A.A. counselor. It would be reasonable to infer from the presence of this letter that Bockmiller was aware of the fact that Hernandez was a recovering alcoholic and that, with that knowledge, she would have checked the personnel file to determine the reason for his earlier termination. In short, the Bockmiller evidence, which itself permits an inference that she was aware of Hernandez's positive drug test, does not eliminate the question of fact that arises as a result of Hughes's explicit statements to the EEOC that the application was rejected because of Hernandez's prior drug addiction. Thus, Hernandez raises a genuine issue of material fact as to whether he was denied re-employment because of his past record of drug addiction.[10]

Hernandez must also demonstrate that he was a "qualified" individual for the job for which he sought rehire, that is, he must demonstrate that he has the "requisite skill, experience, education and other job-related requirements of the employment position." 29 C.F.R. § 1630.2(m). In 1991, when Hernandez resigned, his Employee Separation Sheet rated his work performance as both "good" and "fair."[11]

10. *See infra* note 18 (discussing additional basis for conclusion).

11. Out of four categories — excellent, good, fair, and, poor — Hernandez's ability was rated "good," his conduct, "fair," and his production, "fair." Given that these ratings were for the period in

(Cont'd)

Hernandez argues that because he performed his job satisfactorily for many years and had previously served in the position of Product Test Specialist, he should be deemed "qualified" under the ADA.[12] Hughes agrees with Hernandez as to his ability in 1991. However, it disputes his qualifications at the time he sought rehire in 1994. In February 1999, after Hernandez filed this action, Hughes offered him the position of Product Test Specialist if he passed the necessary examination. Although Hernandez was given time to study and prepare for the exam, upon taking it he completed only four out of eight sections and failed to receive a passing score on any of them. Hughes argues that in light of the 1999 test results, there is no genuine issue as to whether Hernandez was qualified at the time he sought rehire in 1994.[13] Hernandez argues on the other hand that simply because he failed the examination in 1999 does not mean he would have failed it in 1994, a date considerably closer to the time during which he satisfactorily performed the job. Thus, the dispute boils down to the fact that Hernandez was qualified for the

(Cont'd)

which Hernandez struggled with drug and alcohol problems, it would be reasonable to infer that he had the ability to be a far better than average employee at the time of his "resignation."

12. The last position Hernandez held, Calibration Service Technician, was a higher position than that of Product Test Specialist. He had also previously tested for, and performed in, the position of Product Test Specialist.

13. The examination given in 1999 was identical to the one Hernandez would have taken in 1994 had he not been found ineligible for rehire.

job in 1991 and was not qualified in 1999.[14] We believe that, given these two facts, there is a genuine issue of material fact as to whether he was qualified in 1994.[15]

In sum, we hold that, with respect to Hernandez's *prima facie* case of discrimination, he presented sufficient evidence to preclude a grant of summary judgment. Accordingly, the burden switched to Hughes to offer a legitimate non-discriminatory reason for its actions. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *Smith v. Barton*, 914 F.2d 1330, 1340 (9th Cir. 1990).

Hughes states that Hernandez was not rehired because of its unwritten company policy not to rehire employees who were terminated or resigned in lieu of discharge due to their violation of the company's code of conduct. Hughes argues that this unwritten policy is not discriminatory against Hernandez or any other former employee who once had a drug problem because it does not single out such employees or treat them differently from employees who violated other personal conduct rules (such as fighting or stealing from the company).

14. If it is determined at trial that Hernandez was qualified in 1994 but is not today, Hernandez would be eligible for damages.

15. Notwithstanding its letter to the EEOC, Hughes does not contend in its brief on appeal that Hernandez is not a qualified individual because he has failed to show that he has been rehabilitated and is no longer taking drugs. *See* § 12114(b). We note, however, that the letter from A.A. that Hernandez submitted along with his application, and his own affidavit to the effect that he is now drug and alcohol free, are sufficient to give rise to a genuine issue of fact as to that question.

Although the ADA does not protect an employee or applicant who is currently engaging in illegal drug use, *see* § 12114(a), it does protect qualified individuals with a drug addiction who have been successfully rehabilitated. *See* § 12114(b); U.S. EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act §§ 8.2, 8.5 (1992) [hereinafter EEOC Manual] ("An employer may not discriminate against a drug addict, who is not currently using drugs and who has been rehabilitated, because of a history of drug addiction."). Thus, Hughes's unwritten policy against rehiring former employees who were terminated for any violation of its misconduct rules, although not unlawful on its face, violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction. If Hernandez is in fact no longer using drugs and has been successfully rehabilitated, he may not be denied re-employment simply because of his past record of drug addiction.[16]

Moreover, even if it were correct that Bockmiller was not aware of Hernandez's record of drug addiction at the time she rejected his application, Hughes's decision not to re-employ him because of his prior "termination" would violate

16. It is interesting to note that Hughes puts a long time employee who is fired for drug use and has since been rehabilitated in a less favorable position than a new applicant who is a current drug user. Hughes does not exclude from employment a new applicant who may be a drug user. A new applicant must take a drug test in order to qualify for employment. If he tests positive for drug use, he is not automatically excluded from working for Hughes; rather, he is ineligible for 12 months but may re- apply after that time period has passed. In contrast, a long time employee who slips is barred forever.

the ADA. If Bockmiller in fact did not know the reasons for Hernandez's "termination," her lack of knowledge would have been due solely to Hughes's unlawful policy which shields its employees from the knowledge that an employment decision may be illegal. Maintaining a blanket policy against rehire of *all* former employees who violated company policy not only screens out persons with a record of addiction who have been successfully rehabilitated, but may well result, as Hughes contends it did here, in the staff member who makes the employment decision remaining unaware of the "disability" and thus of the fact that she is committing an unlawful act. Having willfully induced ignorance on the part of its employees who make hiring decisions, an employer may not avoid responsibility for its violation of the ADA by seeking to rely on that lack of knowledge.[17] Accordingly, Hughes's unwritten policy is not a "legitimate, nondiscriminatory reason" for its rejection of Hernandez's application.[18] *Burdine*, 450 U.S. at 254.

In sum, we hold that Hernandez has made a *prima facie* case of discrimination on the basis of a disability. He has presented sufficient evidence from which a jury could conclude

17. There is no question that Hughes applied this policy in rejecting Hernandez's application. It has repeatedly emphasized and argued that the rejection was based solely on its policy not to rehire those who previously violated company rules.

18. It also follows that Hernandez has established a *prima facie* case that the cause for the rejection of his application was his prior record of addiction, whether the individual who made the decision to reject was aware of the specific reason for his prior termination or whether she failed to examine the file as a result of Hughes's unlawful blanket policy. *See supra* discussion at pp. 1042-43.

that he was "qualified" for the position he sought in 1994 and that his application was rejected because of his record of drug addiction. Additionally, we hold that a policy that serves to bar the re-employment of a drug addict despite his successful rehabilitation violates the ADA. Therefore, Hughes's unwritten policy that it will not rehire employees who left the company due to violations of personal conduct rules violates the ADA, as applied to employees with the disability of drug addiction whose only work-related offense was testing positive for drug use but are now rehabilitated.[19] Accordingly, summary judgment was improper.[20] We reverse and remand for proceedings consistent with this opinion.

REVERSED and REMANDED.

19. We note that Hughes has not raised a business necessity defense, *see* 42 U.S.C. § 2113(a), and we do not consider when, if ever, such a defense might be available with respect to the hiring of a rehabilitated drug addict.

20. We affirm, however, the district court's ruling that Hernandez failed to timely raise his claim of disparate impact. This claim is not pled in the complaint nor did Hernandez raise it prior to the close of discovery. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000). Accordingly, we grant Hughes's motion to strike the portions of Hernandez's Reply Brief that discuss his disparate impact claim.

Appendix A

ORDER AND DENIAL OF REHEARING DATED AUGUST 12, 2002

REINHARDT, Circuit Judge.

The opinion filed June 11, 2002, is amended as follows:

1. At page 8468, line 11 of the slip opinion, replace "discriminates on account of past disability against" with "screens out."

2. At page 8469, line 7 of the slip opinion, replace "who were terminated for illegal drug use in the work-place" with "whose only work-related offense was testing positive for drug use."

3. At page 8469, line 8 of the slip opinion, insert the following footnote after "rehabilitated.": "We note that Huges has not raised a business necessity defense, *see* 42 U.S.C. § 2113(a), and we do not consider when, if ever, such a defense might be available with respect to the hiring of a rehabilitated drug addict."

With these amendments, the panel has voted to deny the Petition for Rehearing and Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35.

The Petition for Rehearing and Petition for Rehearing En Banc are DENIED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-15512
CT/AG#: CV-98-00319-JMR

JOEL HERNANDEZ,

Plaintiff - Appellant,

v.

HUGHES MISSILE SYSTEMS COMPANY, an Arizona corporation; HUGHES AIRCRAFT COMPANY, a Delaware corporation; RAYTHEON COMPANY, a Delaware corporation,

Defendants - Appellees.

JUDGMENT

APPEAL FROM the United States District Court for the District of Arizona (Tucson).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED and REMANDED.

Filed and entered — 6/11/02 and Amended 8/12/02.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA FILED JANUARY 31, 2001

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CV 98-319 TUC JMR

Joel Hernandez,

Plaintiff,

v.

Hughes Missile Systems Company Corporation, An Arizona Corporation; Hughes Aircraft, Co., A Delaware Corporation; and Raytheon, Co., A Delaware Corporation,

Defendants.

ORDER

Pending before the Court is Defendants' "Motion for Summary Judgment." After reviewing the parties' briefs, considering all the evidence, and hearing oral argument[1],

IT IS ORDERED that Defendants' Motion for Summary Judgment is **GRANTED**.

---

1. The Court did not consider Plaintiff's theory of disparate impact due to Plaintiff's failure to plead or raise the theory in a manner consistent with *Coleman v. The Quaker Oats Company*, 2000 WL1720620 **16-19 (9th Cir. Nov. 20, 2000).

Appendix B

Dated this 30 day of January, 2001.

s/ John M. Roll
JOHN M. ROLL
U.S. District Judge

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Case No. CIV-98-319-T-JMR

JOEL HERNANDEZ,

Plaintiff,

v.

HUGHES MISSILE SYSTEMS CO., et al.,

Defendant.

JUDGMENT IN A CIVIL CASE

X DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendants and against the plaintiff.

January 31, 2001
Date

RICHARD H. WEARE
CLERK

s/ Renee Ludeke
(By) Renee Ludeke, Deputy Clerk

APPENDIX C — STATUTES INVOLVED

42 U.S.C. § 12102

§ 12102. Definitions

As used in this chapter:

* * *

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * * *

Appendix C

42 U.S.C. § 12111

§ 12111. Definitions

As used in this subchapter:

* * *

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

* * * *

Appendix C

42 U.S.C. § 12114

§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

* * * *

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No. 02-749

IN THE

Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant *certiorari* in a case in which several yet to be resolved material factual disputes render the single question presented by the petition for *certiorari* hypothetical in nature?

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INTRODUCTION

Hughes's petition for *certiorari* consistently resolves disputed facts and inferences in its favor in a transparent attempt to convince this Court that the Court of Appeals applied a novel theory of liability under the Americans with Disabilities Act in the proceedings below. In fact, in remanding this case to the district court for trial, the Court of Appeals merely applied this Court's well-established rules governing the denial of summary judgment in the face of material factual disputes regarding the question of discriminatory intent in an employment discrimination case.

The single question presented in Hughes's petition for *certiorari* reflects Hughes's unilateral, self-serving resolution of these factual disputes. The question presented by Hughes is necessarily hypothetical because a finder of fact could reasonably reject Hughes's version of the facts at trial. Under these circumstances, if this Court were to proceed to resolve the question presented in Hughes's petition for *certiorari*, it would require the Court to either resolve disputed facts and inferences in favor of Hughes or render Hughes an advisory opinion based on hypothetical facts.

As explained below, at this procedural juncture, Hughes's petition should be denied as unripe for this Court's review.

STATEMENT OF THE CASE

Joel Hernandez was only twenty-six-years-old when he started working as a janitor for Hughes in Tucson, Arizona on July 21, 1966. More than twenty-five years later when Mr. Hernandez voluntarily resigned from the Company on July 12, 1991, he had been promoted to the position of a Calibration Service Technician and was fifty-one-years-old.

When Mr. Hernandez resigned from Hughes in July of 1991, Hughes evaluated his work ability as "good," his work conduct as "fair," and his work productivity as "fair." In fact, Mr. Hernandez's lengthy tenure of employment with Hughes was unblemished by any significant disciplinary or performance issues, except for two problems relating to absenteeism caused by alcoholism and substance abuse in 1986 and 1991.

Specifically, in August of 1986, Hughes was contemplating disciplining Mr. Hernandez for absenteeism. When Mr. Hernandez informed Hughes that he was suffering from alcoholism, Hughes offered him the option of entering an alcoholic treatment program or being terminated. When a physician subsequently examined Mr. Hernandez and diagnosed him as suffering from "alcohol dependence," Mr. Hernandez admitted himself to a residential alcohol and substance abuse treatment center (Cottonwood de Tucson) in Tucson, Arizona on August 11, 1986. Once in treatment, it was also determined that Mr. Hernandez was "cannabis dependent" and a "cocaine user/abuser." After successfully completing thirty days of intensive in-patient therapy at the center, Mr. Hernandez went back to work for Hughes without incident.

About five years later, Mr. Hernandez's addiction to alcohol and drugs resurfaced. On July 11, 1991, Mr. Hernandez's supervisor thought that he smelled alcohol on Mr. Hernandez's breath and consequently instructed him to undergo a drug screen.[1] After the drug screen returned

1. Hughes's petition claims that Mr. Hernandez "exhibited signs of substance abuse" at work. *See* Petition, p. 2. In fact, the only "sign of substance abuse" that Mr. Hernandez displayed was the belief by (Cont'd)

positive for cocaine, Mr. Hernandez voluntarily resigned from his employment with Hughes on July 12, 1991.

Mr. Hernandez's only misconduct on the job immediately prior to his resignation consisted of testing positive for cocaine. He had not engaged in any other misfeasance or nonfeasance in the workplace prior to his resignation that would have given rise to his termination by Hughes.

In April 1992, Mr. Hernandez became a "good and active" participant in the recovery program of Alcoholics Anonymous. Mr. Hernandez also began attending the Latin Free Methodist Church in Tucson in August 1992, and was baptized as a "faithful and active" member of the Church on October 11, 1992.

Since early July 1992 to the present, Mr. Hernandez "has been clean and sober and has used no alcohol or drugs or otherwise engaged in any conduct constituting substance abuse." In short, after Mr. Hernandez resigned from Hughes after more than twenty-five years of service to the Company, he turned his life around and forswore drugs and alcohol.

His sobriety now intact, on January 27, 1994, Mr. Hernandez wanted to get back to work and applied for the position of Product Test Specialist with Hughes. Mr. Hernandez had previously successfully performed this position at Hughes and there were as many as seven openings for the job.

(Cont'd)
a supervisor that Mr. Hernandez smelled of alcohol, which in most cases is not a sign of drug abuse. Mr. Hernandez's drug screen was negative for alcohol and there is no evidence that the traces of cocaine found in Mr. Hernandez's urine sample had any impact on his work performance.

Mr. Hernandez's employment application to Hughes contained a letter written on his behalf by Mr. John L. Lyman, M.S. Mr. Lyman has worked with recovering alcoholics for many years, and he worked with Mr. Hernandez at Alcoholics Anonymous.

In a letter dated April 26, 1993, Mr. Lyman wrote that:

> I have known Mr. Hernandez for almost a year. I have seen him occasionally at his place of employment and frequently at meetings of Alcoholics Anonymous.
>
> I have worked with recovering alcoholics for ten years and have screened people for the New Hampshire Department of Motor Vehicles and referrals from state and federal parol boards, among my other duties.
>
> I volunteered to write you in behalf of Joel Hernandez as I have seen steady and consistent progress in his recovery from this disease.
>
> Joel attends A.A. regularly, participates in discussion when appropriate, is maintaining his sobriety, and is all in all a good and active member.
>
> Alcoholics Anonymous has clearly been demonstrated as the best recovery tool for alcoholics and Joel's commitment to the program demonstrates to me his willingness to accept responsibility for his recovery.
>
> In summary, I would heartily recommend Joel Hernandez for any position for which he is

> qualified. He is a diligent and caring individual who seems to merit a second chance. You may, if you wish, contact me at home for further information since I am not currently in formal practice due to health problems.
>
> Sincerely,
> John L. Lyman

Mr. Hernandez's application package thus provided Hughes with direct notice that, although he suffered from the disease of alcoholism, he was "maintaining his sobriety" and "actively" and "regularly" participating in Alcoholics Anonymous.

A labor relations representative at Hughes, Ms. Joanne Bockmiller, subsequently pulled Mr. Hernandez's personnel file and reviewed his application package. Although Mr. Hernandez disclosed the fact that he was a recovering alcoholic in his application materials, Hughes did not inquire as to the history and status of Mr. Hernandez's recovery or request that he undergo a drug or alcohol screen. Hughes also did not allow Mr. Hernandez to take any qualification tests related to the position for which he applied, although Mr. Hernandez had already passed these tests during his previous tenure of employment with Hughes.

Mr. Hernandez's application was later summarily rejected by Hughs without explanation sometime in early 1994.[2]

---

2. Approximately five years later, on March 19, 1999, Hughes allowed Mr. Hernandez to take a qualifications test for the position of Product Test Specialist. Although Mr. Hernandez had passed the test before he resigned from Hughes in 1992, he failed the test in 1999. It is undisputed that Hughes did not allow Mr. Hernandez to take the test when he applied for re-employment with Hughes in 1994.

(Cont'd)

After Hughes denied Mr. Hernandez's application for re-employment, Mr. Hernandez filed a timely Charge of Discrimination with the United States Equal Employment Opportunity Commission alleging that Hughes violated his rights under the American with Disabilities Act.

In its first official written response to Mr. Hernandez's Charge of Discrimination, on July 15, 1994, Hughes informed the EEOC that "*Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.*" [Emphasis added.] Hughes further explained that:

> Section 1630.3(b) of the ADA provides that the term "disability" and "qualified individual with a disability" may not exclude an individual who: has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs; or an individual who is participating in a supervised rehabilitation program and is no longer engaging in such use. *However, this provision is not applicable to this situation as [Mr. Hernandez] has provided no evidence to demonstrate he has either successfully completed or is currently undergoing drug rehabilitation.*[3]

(Cont'd)

As the Court of Appeals concluded below, because Mr. Hernandez had previously passed the test and successfully held the position of Product Test Specialist, only a finder of fact can determine whether he was qualified for the position in 1994 when he applied for it.

3. Of course, Mr. Lyman's letter of April 26, 1993 regarding Mr. Hernandez's participation in Alcoholics Anonymous constituted the very evidence of rehabilitation that Hughes claimed that Mr. Hernandez had failed to provide.

[Emphasis added.] Thus, in its first attempt to justify its rejection of Mr. Hernandez's job application, Hughes candidly *admitted* that it rejected the application because of Mr. Hernandez's record of previous "drug use" and an alleged lack of evidence demonstrating his "successful drug rehabilitation."

In November of 1997, the EEOC issued a Letter of Determination finding reasonable cause to conclude that Hughes had violated Mr. Hernandez's rights under the Americans with Disabilities Act.[4] The EEOC's Letter of Determination found that:

> Examination of the evidence reveals [that Mr. Hernandez] was previously employed by [Hughes] for approximately 20 years. He held various positions in which he successfully performed the job functions required of a Product Test Specialist. On July 15, 1991, he resigned in lieu of discharge as a result of testing positive for alcohol and illegal drugs. In January 1994, [Hughes] had seven openings for Product Test Specialist. On January 27, 1994, [Mr. Hernandez] submitted his resume to [Hughes] for consideration for one of these positions. The evidence indicates that at the time of his application [Mr. Hernandez] submitted a statement to [Hughes] indicating he

4. In one of its most recent opinions considering Title VII of the Civil Rights Act, this Court noted that the EEOC issues Letters of Determination finding "reasonable cause" of discrimination in only approximately eleven percent of all charges of discrimination filed with the EEOC. *See Equal Employment Opportunity Commission v. Waffle House, Inc.*, 122 S. Ct. 754, 762 n.7 (2002). Hughes did *not* object to the introduction of the EEOC's Letter of Determination in favor of Mr. Hernandez in the proceedings below.

was recovered and no longer an illegal drug or alcohol user. The evidence shows [that Hughes] rejected [Mr. Hernandez's] application based on his record of past alcohol and drug use.

The Americans with Disabilities Act states that an employer may not deny employment to a drug addict or alcoholic who is not currently using drugs or alcohol and has been rehabilitated, because of a history of drug addiction or alcoholism. In this instance, [Hughes] denied employment to [Mr. Hernandez] because of his history of drug and alcohol abuse. Accordingly, I find reasonable cause to believe that [Mr. Hernandez] was denied hire to the position of Product Test Specialist because of his disability.[5]

After the EEOC's efforts to resolve this dispute by means of conciliation failed, Mr. Hernandez filed a civil action against Hughes in the United States District Court for the District of Arizona in Tucson, Arizona.

Hughes ultimately moved the district court to enter summary judgment against Mr. Hernandez's claims, contending for the first time that it had rejected Mr. Hernandez's application based on an "unwritten" "informal" policy of prohibiting employees terminated for misconduct from ever working for Hughes again.[6] Of course, this belated assertion contradicted

5. The EEOC'S Letter of Determination was signed on behalf of the Commission by its District Director, Mr. Charles D. Burtner

6. On page six of its petition, Hughes asserts that "[m]any companies disqualify discharged persons from rehire." There is nothing in the record to support that assertion or the related contentions that follow it.

Hughes's earlier express admission to the EEOC that "*Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.*"

Moreover, Hughes could not identify the origin, history, scope, or purpose of the alleged unwritten policy prohibiting the rehiring of employees terminated for violating company rules.

In stark contrast to Hughes's alleged unwritten policy regarding the re-employment of terminated employees, Hughes's written, formal personnel policies provided that if an applicant for employment tested positive for drugs or alcohol, the applicant is rendered ineligible for employment with Hughes for just the next twelve months, not forever. Similarly, Hughes's written personnel policies provided that an applicant who admitted to former drug or alcohol use could nonetheless be considered for immediate employment if the drug screen of the applicant returned negative. Hughes's written personnel policies also did not require that employees testing positive for illegal drugs be terminated.

Thus, Hughes's alleged "unwritten" "informal" policy barring Mr. Hernandez's re-employment was at odds with its written, formal personnel policies regarding drug abuse *and* the written formal explanation that Hughes provided to the EEOC on July 15, 1994. Under these circumstances, the very existence of the alleged unwritten policy was suspect.

Hughes also argued that the person who actually rejected Mr. Hernandez's job application, Ms. Joanne Bockmiller, did not know that he suffered from alcoholism or that he had resigned from Hughes after testing positive for cocaine. However, Ms. Bockmiller's assertions in this regard were

belied by the fact that John Lyman's letter regarding Mr. Hernandez's participation in Alcoholics Anonymous was part of Mr. Hernandez's application packet. In addition, Ms. Bockmiller admitted that she had pulled Mr. Hernandez's entire personnel file (which included his history of treatment for alcohol and drug addiction) when she received his application package.

Ignoring the various factual disputes regarding the motivation underlying Hughes's rejection of Mr. Hernandez's job application, the district court granted Hughes's motion for summary judgment without explanation and dismissed Mr. Hernandez's complaint.

Mr. Hernandez timely appealed from the district court's judgment.

Based on Hughes's express admission that "*Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation*," the Court of Appeals concluded that a material factual dispute precluded summary judgment in Hughes's favor and remanded the case to the district court for trial.[7]

---

7. Notwithstanding Hughes's contention to the contrary at page six of its petition, the Court of Appeals did not hold that "the ADA confers preferential treatment upon individuals who are fired for drug-related misconduct." The Court of Appeals stated only (in dicta) that Hughes could not impose a blanket prohibition on the re-employment of rehabilitated alcoholics and drug addicts whose only previous misconduct consisted of testing positive for alcohol or illegal drugs when formerly employed by the Company.

REASONS FOR DENYING THE PETITION

Material factual disputes render this case inappropriate for review.

This case is not ripe for review. The Court of Appeals was correct in concluding that several material factual disputes preclude the summary disposition of this litigation. Before these factual disputes are actually resolved by a finder of fact, the abstract legal question which Hughes asks this Court to review is necessarily hypothetical. Indeed, depending upon how a jury ultimately resolves the various factual disputes in this case, the question presented in Hughes's petition for certiorari may be rendered completely moot.

In short, Hughes is asking this Court to render an advisory opinion based on hypothetical facts that a finder of fact might ultimately reject at trial.

The central factual dispute in this case concerns the motivation underlying Hughes's rejection of Mr. Hernandez's job application. Mr. Hernandez contends — and Hughes's statement to the EEOC admits — that Hughes refused to rehire him because he is a recovered alcoholic/drug addict and that Hughes did not believe that he was rehabilitated. Seeking to avoid the legal consequences of its initial admission to the EEOC, Hughes now claims that an "unwritten" "informal" policy of not rehiring employees "terminated" for violating company rules was the actual reason why it rejected Mr. Hernandez's application.

In order for this Court to even consider the question presented by Hughes's petition, the Court must first resolve at least three material factual disputes in Hughes's favor.

First, the Court must at least tentatively find that Hughes's alleged "unwritten" policy of never rehiring employees terminated for violating company rules actually existed at the time when Hughes rejected Mr. Hernandez's job application. However, because a jury might ultimately determine that Hughes's purported unwritten policy did not exist as a matter of fact, any decision by this Court regarding this issue at this time would necessarily be advisory in nature.

Second, this Court would also have to find that Hughes actually terminated Mr. Hernandez because Hughes's alleged unwritten policy regarding the re-employment of terminated employees does not apply to employees who quit. In the proceedings below, Mr. Hernandez testified that he voluntarily resigned from his employment with Hughes. Although Hughes now claims that, pursuant to yet another one of its "unwritten" "informal" policies, Mr. Hernandez's resignation was the functional equivalent of termination, a jury could reasonably conclude that Hughes's contentions in this regard are not credible and are merely a smoke-screen to obscure Hughes's discriminatory rejection of Mr. Hernandez's application for employment.

Third, even if this Court were to find: (1) that Hughes's alleged unwritten policy regarding the re-employment of terminated employees in fact exists; and (2) that Hughes actually terminated Mr. Hernandez, the Court will still have to resolve the question of whether or not Hughes's unwritten policy regarding the re-employment of terminated employees

was a legitimate workplace rule applied in good faith or was misused by Hughes as a pretext for discriminating against Mr. Hernandez based on his record of alcohol and drug addiction and Hughes's fear that his rehabilitation might be short lived.

Indeed, based on the direct evidence of Hughes's discriminatory intent in this case — consisting of Hughes's admission that "Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation" — only a finder of fact can properly resolve the questions surrounding Hughes's intent in rejecting Mr. Hernandez's application.[8]

Lastly, Hughes's sustained request for this Court to either sit as a finder of fact or render an advisory opinion regarding hypothetical facts also disregards this Court's long standing rules governing summary judgment. As this Court recently acknowledged in *Board of Education v. Earls*, 122 S. Ct. 2259, 2575 (2002), "[o]n summary judgment the inferences to be drawn from the underlying facts contained in affidavits, attached exhibits, and depositions must be viewed in the light most favorable to the parties opposing the motion."

This Court should reject Hughes's invitation to invert these principles by resolving disputed facts and inferences in its favor. As the Court of Appeals correctly concluded, this dispute must be resolved by a finder of fact at trial.

---

8. Hughes's contention on page ten of its petition that the opinion of the Court of Appeals in this case creates "a conflict in the Circuits on the validity of no-rehire rules" is similarly unfounded. The Court of Appeals concluded only that a material factual dispute regarding the issue of Hughes's intent in denying Mr. Hernandez's job application precluded summary judgment. This certainly is not a novel conclusion and does not conflict with any case authority from the courts of appeal.

CONCLUSION

For the reasons set forth above, this Court should deny Hughes's petition for certiorari.

Respectfully submitted,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The court of appeals resolved this case solely on a question of law, and this petition presents exactly — and only — that question of law. Respondent Hernandez does not seriously dispute that the question of law exists, that it is important,[1] and that the circuits are in conflict. Hernandez only suggests that the instant case is not in the proper posture to resolve the legal question. But Hernandez is wrong, as shown below.

I. THE PETITION PRESENTS A PURE QUESTION OF LAW; NO FACTUAL DISPUTE IMPEDES THIS COURT'S REVIEW

Judge Reinhardt's opinion held as a matter of law that Hughes'

> policy that it will not rehire employees who left the company due to violations of personal conduct rules [although lawful as to the non-disabled] violates the ADA, as applied to employees with the disability of drug addiction whose only work-related offense was testing positive for drug use but are now rehabilitated.

(Pet. App. 13a.) Hernandez characterizes that clear holding as "dicta" (Opp. at 10 n.7), and suggests that "factual disputes" remain to be resolved (Opp. at 12-13). But Hernandez is demonstrably wrong.

First, Hernandez tells the Court that there remains a dispute as to whether "Hughes' alleged 'unwritten' policy of

1. Hernandez notes (Opp. at 7 & n.4) that the EEOC made a "reasonable cause" finding in his favor. That finding simply underscores that the legal question presented is important; the question is one as to which the EEOC, along with the Ninth Circuit, requires guidance. Hernandez contends that there is nothing in the district court record showing that other employers care about the legality of no-rehire rules. (Opp. at 8 n.6.) But the amicus brief in support of *certiorari* from the Equal Employment Advisory Council demonstrates that such rules are commonplace.

never rehiring employees terminated for violating company rules actually existed" (Opp. at 12.) There is no such dispute. As the Ninth Circuit stated, Hughes unquestionably has a "policy against rehiring employees who were terminated for any violation of its misconduct rules." (Pet. App. 11a.)

Second, Hernandez contends that a factual dispute exists over whether this policy was applied to him. (Opp. at 12.) Once again, not so. The Ninth Circuit cited uncontradicted evidence "that once [the decisionmaker] saw that [Hernandez] 'quit-in-lieu of discharge,' she concluded that he was ineligible for rehire. . . ." (Pet. App. 3a-4a.) The court concluded that "[*t*]*here is no question that Hughes applied this [no rehire] policy in rejecting Hernandez's application*." (Pet. App. 12a n.17; emphasis added.)[2]

Given Hernandez's claim about these supposed "factual disputes," one might reasonably ask how the Ninth Circuit could have been so badly mistaken about the record. The simple answer is that there was — and is — no factual dispute, *and Hernandez acknowledged as much in the court of appeals.* Hernandez forcefully and expressly argued to the court of appeals that he was ineligible for rehire because Hughes has a "practice of prohibiting individuals who have resigned in lieu of termination to be re-hired." Appellant's Reply Brief in the Court of Appeals at 7-8.[3] Thus, Hernandez admitted that the policy existed and was applied to him; indeed, *that was his principal theory of the case*. *Id.* (the policy is unlawful because it disqualifies "all individuals who's [sic] resignation in lieu of termination was due to a disability").

2. Hernandez alternatively contends that there is a factual dispute over the applicability of the policy to persons who resigned in lieu of involuntary discharge. (Opp. at 12.) Still again, not so. As the Ninth Circuit stated, there is "no difference in Hughes' treatment of employees who were terminated as opposed to those who resigned under threat of termination." (Pet. App. 4a n.4.)

3. A copy of Hernandez's Reply Brief has been lodged with the Clerk of this Court for the Court's convenience.

Hernandez's fidelity to the record thus waxes and wanes depending on the circumstances. But that sort of sleight of hand cannot prevent review here. As this Court recently reiterated, where "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), *quoting Davis v. Wakelee*, 156 U.S. 680, 689 (1895). This rule "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.* (citation omitted). The rule serves the "integrity of the judicial process" by preventing parties from "playing fast and loose with the courts" based on the "exigencies of the moment." *Id.* (citations and internal quotations omitted).

Because there are no factual questions remaining to be decided, this case is well-positioned for review. As the court of appeals stated, "[T]here is no question" that Hughes had a no-rehire policy, that it applied that policy uniformly to those who quit in lieu of termination, and that the policy was the basis on which Hernandez's application for reemployment was rejected. (Pet. App. 11a-12a & n.17.) Hernandez now says that a dispute remains as to whether the no-hire rule is "a legitimate workplace rule." (Opp. at 13.) This, of course, is not a factual question at all, but rather precisely the issue posed by this petition: whether the ADA requires that employers provide preferential rehire rights — second chances — when individuals with alleged disabilities engage in misconduct.[4] The Ninth Circuit answered that

4. Tellingly, Hernandez's brief quotes the letter from the Alcoholics Anonymous counselor attached to Hernandez's job application. The letter expressly asked Hughes to give Hernandez "a second chance." (Opp. at 5.) The law does not require this, as Hughes' petition demonstrated. Contrary to Hernandez's argument (Opp. at 9), there is no mystery, let alone a legal issue, behind Hughes'

(Cont'd)

question in the affirmative, and in doing so created a rift in previously settled law that this Court should resolve.

The other alleged "factual disputes" are red herrings. Hernandez contends that Bockmiller, who rejected Hernandez's rehire application, perhaps could have deduced that Hernandez's prior discharge was related to substance abuse (Opp. at 9-10),[5] and that the person who wrote Hughes' EEOC position statement did not accurately set forth some facts about Hernandez's disqualification from rehire (Opp. at 6).[6] These are red herrings because they at most pertain to Hughes' second, alternative basis for summary judgment. The petition noted (Pet. at 16-17) that summary judgment also could have been sustained on the narrow ground that the decisionmaker, Bockmiller, did not even know of Hernandez's drug addiction, and hence could not possibly have engaged in discrimination based on the addiction. (Judge Reinhardt's response to that contention — that an employer violates the ADA by not publicizing to its hiring staff who the "disab[led]" persons might be (Pet. App. 12a) — is unprecedented and wrong.) Whether the Court wishes to consider that narrower ground, perhaps in a summary reversal, has nothing whatsoever to do with the broader issue presented by the petition: whether no-rehire rules may be uniformly applied. That broader issue is a pure question of law, and there are no factual disputes that pertain to it.

(Cont'd)
rule (i) prohibiting rehire of *employees* who are discharged for misconduct like drug use, but (ii) banning for one year *applicants* who fail a pre-hire drug test. The former are persons who violated a clear company rule while working on missile systems sold to the U.S. government. The latter are persons who engaged in improper conduct, but who never were subject to Hughes' rule. Employees and applicants simply are not similarly situated.

5. The deduction, Hernandez tells us, could have been made because of the reference in his minister's letter to *alcoholism*. (Opp. at 5.) But nothing in the letter mentioned *cocaine use*.

6. The stray language in the letter at most suggested that, with satisfactory proof of drug rehabilitation, the Company might have considered making an exception to its no-rehire rule in Hernandez's case. That stray language is wrong — Hughes' policy permits no exceptions for anyone — but the language (far from suggesting a legal violation) suggested that the Company might have considered doing *more than* what the ADA requires.

CONCLUSION

The Court should grant the petition for *certiorari* and consider summary reversal of the court of appeals.

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v.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of Petitioners in this case. The written consent of Petitioners Raytheon Company, *et al.*, has been filed with the Clerk of the Court. Counsel for Respondent Joel Hernandez has not consented.

In support of its motion, EEAC by the following shows that this brief brings relevant matters to the attention of the Court that have not already been brought to its attention by the parties:

1. The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 340 of the nation's largest private sector corporations.

2. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. In addition, EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

3. All of EEAC's member companies are employers subject to Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117, and many are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, as well as other workplace nondiscrimination laws.

4. As employers, and as potential defendants to employment discrimination claims asserted under these laws, EEAC's members have a substantial interest in the issue presented in this case—*i.e.*, whether the Americans with Disabilities Act confers preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use.

5. Many of EEAC's member companies, if not all, have adopted standards governing the conduct of employees in the workplace, including rules prohibiting the use of, or being under the influence of, illegal drugs and alcohol on the job. Many of these rules are grounded in the need to prevent workers from being injured or killed on the job, or from killing or injuring others, either in the workplace or among the general public. For these companies, an employee's rule infraction that is serious enough to warrant termination also makes the offender ineligible for rehire at a later date, and for the same reason.

6. The decision of the Ninth Circuit in this case—that an employer's policy against rehiring former employees terminated for violating a company conduct rule violates the ADA as a matter of law—turns disability discrimination law upside down, creating a shield behind which anyone who claims "my disability made me do it" can hide from accountability for his or her actions. In addition to rewarding drug abuse, the decision confers potential ADA protection on any employee who is terminated for criminal actions such as violence toward a co-worker, theft of company property or funds, and the like. EEAC's brief provides the Court with information concerning the direct conflict between the decision below and those of other circuit courts of appeals. It also highlights for the Court the reasons why the case is of exceptional importance.

7. Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests that the Court grant it leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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December 13, 2002

QUESTION PRESENTED

Whether the Americans with Disabilities Act confers preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use.

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IN THE

Supreme Court of the United States

No. 02-749

RAYTHEON COMPANY, *et al.*,
Petitioners,

v.

JOEL HERNANDEZ,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* contingent on the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel for amicus curiae authored this brief in its entirety. No person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes approximately 340 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies are employers subject to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities.

EEAC's members include chemical and other manufacturing companies, oil refineries, airlines, pharmaceutical manufacturers, railroads, health care providers, nuclear power companies, defense contractors, and many others. Many if not all of EEAC's members have adopted standards governing the conduct of employees in the workplace, including rules prohibiting the use of, or being under the influence of, illegal drugs and alcohol on the job. Many of these rules are grounded in the need to prevent workers from being injured or killed on the job, or from killing or injuring others, either in the workplace or in the general public. For

these companies, an employee's rule infraction that is severe enough to warrant termination also makes the offender ineligible for rehire at a later date, and for the same reason.

Thus, EEAC's members are directly affected by the Ninth Circuit's decision in this case. The court below concluded that an employer's policy against rehiring former employees terminated for violating a company conduct rule violates the ADA as a matter of law. It thus creates an automatic "back door" for former employees to whom the front door is barred due to their violation of a company rule.

The decision below turns disability discrimination law upside down, making it a shield behind which anyone who claims "my disability made me do it" can hide from accountability for his or her actions. In addition to rewarding drug abuse, it confers potential ADA protection on any employee who is terminated for criminal actions such as violence towards a co-worker, theft of company property or funds, and the like. The Ninth Circuit's unprecedented interpretation of the ADA is contrary to prior decisions of other circuit courts of appeals and involves a question of exceptional federal importance.

STATEMENT OF THE CASE

Joel Hernandez was a Calibration Service Technician for Hughes Missile Systems Company [2] when he tested positive for cocaine in a July 1991 drug test. Pet. App. 2a. The company gave him the option of resigning in lieu of termination, and he did. *Id.*

In January 1994, Hernandez again applied for a job at Hughes. *Id.* The company rejected his application because

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[2] Hughes Missile Systems Company has since been acquired by Raytheon Company. Pet. App. 1. Since the relevant events occurred prior to the acquisition, we will refer to Petitioners collectively as "Hughes" or "the Company."

his record indicated that he was ineligible for rehire due to personal misconduct, *i.e.*, violation of a company policy that mandated termination or resignation in lieu of termination. Pet. App. 4a. Hernandez subsequently filed an ADA charge with the Equal Employment Opportunity Commission, contending that Hughes discriminated against him on the basis of his having a record of a drug addiction. *Id.* When he subsequently sued Hughes on the same grounds, the trial court granted summary judgment in favor of Hughes. Pet. App. 16a–17a. Hernandez appealed.

The Ninth Circuit ruled that Hughes' policy against rehiring any former employee terminated for violating a conduct rule "violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction." Pet. App. 11a. The court below rejected Hughes' argument that the policy is nondiscriminatory because it does not single out employees with a record of drug addiction or treat them any differently from other employees fired for using drugs or for violating other conduct rules that require termination and a bar from rehire, such as rules against fighting or stealing. Pet. App. 10a–11a. Hughes now seeks review by this Court.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision conflicts directly with the decisions of several other circuit courts of appeals holding that an employer may refuse to rehire a former employee who was terminated for violating a company conduct rule even if the conduct allegedly was caused by a disability. *E.g., Harris v. Polk County, Iowa*, 103 F.3d 696, 697 (8th Cir. 1996). The decision below likewise cannot be reconciled with the numerous decisions of other circuits which have held that "the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability." *Jones v. American Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999).

Indeed, the Equal Employment Opportunity Commission, which enforces Title I of the ADA, has stated time and again that employers may enforce legitimate conduct standards as long as they do so consistently, and need not retroactively forgive misconduct if they learn it was caused by a disability. *E.g., EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Mar. 1, 1999) at 34, *reprinted in* EEOC Compl. Man. (BNA) N:2465, N:2480. Moreover, the ADA itself supports an employer's efforts to prevent drug abuse in the workplace, providing specific permission for employers to hold drug abusers to the same standards as other employees. 42 U.S.C. § 12114(c)(4).

Review and reversal of the decision below is immensely important to employers, who find it devastating to their efforts to manage employees. Work rules, and a policy against rehiring those who break them, are crucial tools for maintaining safety, productivity, and legal compliance. The Ninth Circuit's decision provides an automatic "bye" for any offender who can claim that "my disability made me do it."

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS DIRECTLY WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS HOLDING THAT DISCIPLINARY ACTION FOR VIOLATING A WORKPLACE CONDUCT RULE SUCH AS A PROHIBITION ON DRUG USE DOES NOT VIOLATE THE AMERICANS WITH DISABILITIES ACT

A. Several Federal Courts Have Concluded That Refusal To Rehire a Former Employee Terminated for Misconduct Does Not Violate the ADA

Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117, prohibits discrimination in employment against a "qualified individual with a disability" on the basis of a disability. 42 U.S.C. § 12112(a). It does not relieve employees or former employees from the consequences of their misconduct, regardless of whether their wrongdoing may have been triggered by a disability affecting behavior.

Several circuit courts of appeals, in direct contrast to the Ninth Circuit below, have recognized that an employer's decision to disqualify former employees from eligibility for rehire if they were terminated for misconduct does not constitute disability discrimination, even if the underlying conduct allegedly was related to a disability. *E.g.*, *Harris v. Polk County, Iowa*, 103 F.3d 696, 697 (8th Cir. 1996) (holding that employer did not violate ADA by refusing to consider for rehire employee who had been fired several years earlier after criminal conviction for shoplifting, even though she contended that her shoplifting was caused by

mental problems that had been resolved).[3] A number of district courts have reached the same correct conclusion. *E.g.*, *Peyton v. Otis Elevator Co.*, 72 F. Supp.2d 915 (N.D. Ill. 1999) (employer did not violate ADA by refusing to rehire former employee terminated for absenteeism caused by alcoholism); *Thomas v. Mississippi State Dep't of Health*, 934 F. Supp. 768 (S.D. Miss. 1996) (ADA did not require employer to overlook former employee's prior termination for absenteeism and negligence due to crack cocaine addiction).

B. An Adverse Employment Action for Misconduct, Such as Violating a Work Rule, Does Not Violate the ADA Even Though the Misconduct May Be Traceable to a Disability

The basis for these decisions is the fundamental distinction between a disability itself and conduct that allegedly is caused by a disability. The Seventh Circuit's decision in *Pernice v. City of Chicago*, 237 F.3d 783 (7th Cir. 2001), provides a good, and typical, example. The City fired Pernice, a 20-year City employee, after he was arrested and charged with disorderly conduct and possession of cocaine. Pernice sued the City under the ADA, claiming that he had been discharged due to his disability of drug addiction, since his drug possession was 'an integral part' of his disability. *Id.* at 784. The Seventh Circuit, upholding the trial court's dismissal of the complaint, stated unequivocally that "[i]t is well-established that an employee can be terminated for violations of valid work rules that apply to all employees, even if the employee's violations occurred under the influence of a disability. This rule is particularly applicable to employees who violate rules relating to drug or alcohol abuse." *Id.* at 785 (citation omitted).

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[3] The Petition for a Writ of Certiorari provides additional examples. Pet. 10-11.

In so doing, the Seventh Circuit rejected Pernice's argument that the ADA protected him because his disability—drug addiction—caused his actions, stating that "Pernice made a conscious choice to *actually* possess drugs. We therefore have little trouble separating his misconduct from his alleged disability." *Id.* at 787.

Courts have reached the same conclusion with respect to workplace rules against alcohol abuse. *See, e.g., Martin v. Barnesville Exempted Village Sch. Dist. Bd. of Educ.*, 209 F.3d 931, 934 (6th Cir.) (concluding that even if the school district "regarded" the plaintiff as an alcoholic, it had a legitimate, nondiscriminatory reason for refusing to place him in a bus driver position after he was caught drinking on the job), *cert. denied*, 531 U.S. 992 (2000); *Renaud v. Wyoming Dep't of Family Servs.*, 203 F.3d 723, 730 (10th Cir. 2000) (rejecting an ADA claim challenging the dismissal, pursuant to the employer's substance abuse policy, of a school superintendent who came to work drunk, stating that "ADA protection . . . does not extend to an alcoholic's use of alcohol on the job").

Indeed, the same analysis applies to conduct violations traceable to other conditions as well. In *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998), the Fifth Circuit held that an employee's violation of the company's workplace violence policy constituted a legitimate, nondiscriminatory business reason for his termination, even if his conduct was caused by post-traumatic stress disorder (PTSD), noting that "[t]he cause of Hamilton's discharge was not discrimination based on PTSD but was rather his failure to recognize the acceptable limits of behavior in a workplace environment"). The Seventh Circuit ruled that an employer that terminated a front loader driver with sleep apnea for sleeping on the job did not violate the ADA. *Leonberger v. Martin Marietta Materials, Inc.*, 231 F.3d 396 (7th Cir. 2000). The Sixth Circuit did likewise with

respect to a hospital that terminated an anesthesiologist who repeatedly dozed off on the job, noting that there was no evidence that the hospital had treated him any differently than it would have "a physician who slept on the job for another reason, such as staying up late every night to watch television." *Brohm v. JH Properties, Inc.*, 149 F.3d 517, 522 (6th Cir. 1998). In *Hill v. Kansas City Transportation Authority*, 181 F.3d 891, 894 (8th Cir. 1999), *cert. denied*, 528 U.S. 1137 (2000), the Eighth Circuit concluded that where an employee waited until after she twice fell asleep on the job, "a work rule violation she knew would mandate her discharge," before requesting accommodation, the ADA did not require her employer to grant her another chance to better control her own treatable condition. Indeed, as the Fourth Circuit has said, "[t]he law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability." *Jones v. American Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999) (holding that employer did not violate the ADA by terminating an employee who threatened his supervisor's life).

The decision below overlooks this crucial distinction, treating Hernandez' workplace cocaine use as a mere incidental consequence of his possible drug addiction. Indeed, the Ninth Circuit described former employees terminated for drug use as individuals "whose only work-related offense was testing positive" because of their addiction. Pet. App. 13a.

On the contrary, the work related offense was illegal drug use, and it is immaterial whether or not the offending employee happens to have an addiction. *See, e.g., Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997) (holding that an employer who fired an employee for threatening to kill another employee did not violate the ADA, even though the threat was caused by her mental

illness, stating "if an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act," and quoting "'Was't Hamlet wrong'd Laertes? Never Hamlet./ If Hamlet from himself be ta'en away,/ And when he's not himself does wrong Laertes,/ Then Hamlet does it not; Hamlet denies it./ Who does it then? His madness.' Hamlet, Act V, sc. ii, ll. 229-233").

Since an employer may terminate an employee for workplace misconduct even if caused by a disability, it follows that the employer may refuse to rehire that person for the same reason. In both cases, the reason for the action is the conduct—violation of the work rule—rather than any underlying explanation or excuse for the conduct. *See Harris*, 103 F.3d at 697.

That the Ninth Circuit misunderstood this important distinction is further shown by the comment at n.16 of its opinion (Pet. App. 11a n.16), which characterizes as "interesting," and presumably inexplicable, that an applicant who tests positive for drugs is ineligible to re-apply for 12 months, while the employee who tests positive is ineligible forever. The employee who comes to work with drugs in his or her system has violated a work rule, has placed company equipment, product, and perhaps even lives in jeopardy, and has abused the company's trust. The applicant who tests positive at the pre-employment stage has damaged only his own career options.

C. EEOC Guidance Confirms That the ADA Permits Enforcement of Conduct Standards and Does Not Require Pardons Due to Disability

The Equal Employment Opportunity Commission, the federal agency with enforcement authority over Title I of the ADA, consistently has interpreted the statute as permitting an

employer to enforce reasonable conduct standards, as long as they are applied consistently, even though it may mean that an employee faces discipline for conduct that can be traced to a mental or physical condition. For example, the preamble to the agency's 1991 regulations interpreting the ADA states that "employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards." 56 Fed. Reg. 35725, 35733 (July 26, 1991). In Section 902 of the agency's Compliance Manual, which addresses the definition of "Disability" under the ADA, the EEOC states that an employer "does not have to excuse [an employee's] misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees." EEOC Compl. Man. (BNA) § 902.2 n.11 (Feb. 2002).

The EEOC included a lengthy discussion of conduct issues in its *Enforcement Guidance: Psychiatric Disabilities and the Americans with Disabilities Act*, issued in 1997. There, the agency confirmed that an employer may hold individuals with disabilities to conduct standards that are "job-related and consistent with business necessity" as long as they do so consistently—that is, as long as they would mete out the same discipline to an employee with no disability. The agency mentioned company policies against workplace violence, theft, and destruction of property as examples of conduct rules that would be considered job-related and consistent with business necessity. *EEOC Enforcement Guidance: Psychiatric Disabilities and the Americans with Disabilities Act* (Mar. 25, 1997) at 30-32, *reprinted in* EEOC Compl. Man. (BNA) N: 2331, N:2340-41. The agency stated explicitly that an employer is not required to excuse past misconduct, *e.g.*, by rescinding a discharge once it learns that the conduct may have been caused by a disability. *Id.* at 31.

Similarly, the EEOC has confirmed that an employer's "reasonable accommodation" obligation under the ADA does not include forgiving past infractions. In enforcement guidance, the agency states that although an employer sometimes may have to make a reasonable accommodation to allow a qualified individual with a disability to meet a conduct standard in the future, it need not do so "where the punishment for the violation is termination." *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Mar. 1, 1999) at 35, *reprinted in* EEOC Compl. Man. (BNA) N:2465, N:2480 (footnote omitted). As the agency explained, "[s]ince reasonable accommodation is always prospective, an employer is not required to excuse past misconduct, even if it is the result of the individual's disability." *Id.* (citing *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666 (7th Cir. 1995)).

Accordingly, the federal agency with enforcement responsibilities for Title I of the ADA has interpreted that law as permitting employers to discipline employees for violating conduct rules, even if the misconduct may be traceable to a disability.

D. The ADA Unequivocally Supports Employer Efforts To Prevent Workplace Drug Use, Including Discipline of Employees Who Violate Their Rules

While drug addiction and alcoholism may qualify as disabilities under the ADA, the law explicitly approves employer conduct standards regarding the illegal use of drugs and the use of alcohol. The ADA permits employers to prohibit substance abuse at the workplace, 42 U.S.C. § 12114(c)(1), to prohibit employees from being under the influence of illegal drugs or alcohol at work, 42 U.S.C. § 12114(c)(2), to require employees to conform with the requirements of the federal Drug-Free Workplace Act of

1988, 41 U.S.C. §§ 701 *et seq.*, 42 U.S.C. § 12114(c)(3), and to require that employees comply with alcohol and drug abuse regulations adopted by the Departments of Defense or Transportation, or the Nuclear Regulatory Commission, if applicable. 42 U.S.C. § 12114(c)(5). Perhaps most importantly for purposes of this case, the ADA specifically permits employers to hold employees who use drugs illegally, and those who are alcoholics, to the same qualification standards as other employees. 42 U.S.C. § 12114(c)(4). The decision below conflicts with these unequivocal statutory provisions.

II. THE DECISION BELOW INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE TO EMPLOYERS

A. Employers Establish Work Rules for Legitimate and Nondiscriminatory Reasons

Many if not all employers have adopted rules that establish minimum standards for employee conduct in the workplace. Safety concerns provide one reason for having such rules. A worker who is fighting, threatening violence or merely engaging in horseplay that distracts other workers, or working carelessly or without protective equipment, can cause an accident, injuring himself, co-workers, and perhaps the public. Productivity expectations are another reason, giving rise to rules against insubordination, excessive absenteeism, repeated tardiness, and excessive personal telephone calls. Some conduct rules, such as those governing respect for co-workers, use of employer-provided e-mail, and the like, are based at least in part on legal requirements, such as potential employer liability for workplace harassment, and the like. Prohibitions against the use of drugs and alcohol fall in all three categories.

In virtually every company, violation of conduct rules can lead to discipline up to and including termination.

Enforcement of a conduct rule not only supports the legitimate goal underlying the rule itself, but encourages future compliance by other employees.

B. Considering Employees Who Have Been Terminated for Misconduct as Ineligible for Rehire Is a Common Practice Grounded in Legitimate Business Purposes

Like Hughes in this case, most companies view a termination for violating a work rule as a permanent bar to eligibility for rehire. The practice provides a neutral means of ensuring that anyone who has been fired once for an infraction so severe that it warranted the ultimate discipline is not accidentally rehired by someone who lacks access to the record.[4] Employees who have been fired for stealing, for stalking, threatening or assaulting another employee, for bringing a firearm to work, for being a serial sexual harasser, or for being under the influence of illegal drugs frequently fall in this category.

The practice is particularly common with respect to former employees terminated for violation of a company's prohibitions against drug abuse. For example, the U.S. Department of Labor, as part of its "Substance Abuse Information Database," which is designed as a resource for employers, maintains a booklet incorporating a model "drug free" policy which provides that employees terminated for drug use following company sponsored rehabilitation "will be

[4] The customary practice of marking on such an employee's file that he or she is "ineligible for rehire" allows those who may be involved in that individual's future application to make appropriate decisions without revisiting the original infraction. It serves two purposes. First, it guarantees the finality of business decisions that were appropriate when made. Second, it actually protects the individual, since the designation "ineligible for rehire" is sufficient unto itself and obviates the need for someone who was not involved in the original decision to delve into all of the often unsavory details surrounding it.

ineligible for rehire." United States Dep't of Labor, *What Works: Workplaces Without Alcohol and Other Drugs* (1994) (Appendix A: Workplace Substance Abuse Policy Models, Sample 2: Drug-Free Policy of (Company B), at 23 [p. 7 of .pdf]) [5]. Such varied employers as a concessionaire at Mt. Rushmore [6], the Mt. Vernon Community School Corporation in Fortville, Indiana [7], and the Johns Hopkins Health System (which marks *any* employee discharged for any reason other than job performance ineligible for rehire)[8], have all adopted the same practice. Indeed, a company that performs pre-employment screening reported earlier this year that 11% of the employers the company contacted as part of the 2.6 million background verifications it performed in the year 2001 reported applicants ineligible for rehire. Automatic Data Processing, Inc. (ADP) Hiring Index (2001).[9]

C. The Decision Below Seriously Undermines an Employer's Ability To Enforce Its Conduct Standards

The Ninth Circuit's decision results in an automatic right to a "second chance" to any worker fired for misconduct, even

[5] *available at* http://www.notes.dol.gov/said.nsf/e70e2e0197c60a7f8525641f0061318e/A2B332B1DD5C41838525641F00627DE8?OpenDocument&ExpandSection=4

[6] Xanterra Parks and Resorts, *Mount Rushmore Drug and Alcohol Policy*, *available at* http://www.coolworks.com/rushmore/policy.htm (last visited Dec. 11, 2002).

[7] Mt. Vernon Community School Corp., *Policies and Bylaws*, *available at* http://www.mvcsc.k12.in.us/4000.html#eap (last visited Dec. 11, 2002).

[8] Johns Hopkins Health System, *Employee Handbook—Non-Represented Employees* (Separation), *available at* http://www.hopkinsmedicine.org/jhhr/hbook_nb.htm#nbu36 (last visited Dec. 11, 2002).

[9] *available at* http://www.investquest.com/iq/a/aud/ne/news/adpmisleading.htm

drug use,[10] if he or she can somehow tie the infraction to a disability. Based on the Ninth Circuit's reasoning, an employer would be liable under the ADA if it refused to rehire a former employee who was terminated for attacking a co-worker or customer, for embezzling company funds, for sexual harassment, for extreme or repeated carelessness, for boisterous and disruptive behavior, for execrable performance, or any number of other legitimate reasons, as long as the former employee can claim that the misconduct stemmed from a disability. Even if the would-be plaintiff fails to qualify as an "individual with a disability" under the ADA and this Court's decision in *Toyota Motor Manufacturing, Inc., v. Williams,* 534 U.S. 184 (2002), the employer will still have faced the threat, or indeed the promise, of costly litigation merely because it sought to uphold a legitimate work rule it established in order to run its business properly.

Accordingly, the decision below ties the hands of every employer that desires to maintain discipline in its workforce, to guard against safety hazards, comply with legal requirements, ensure product and service quality, maintain its

[10] Drug abuse remains a serious problem for employers. According to the recent *National Household Survey on Drug Abuse* report, in the year 2000, 8.1 percent of full-time workers aged 18-49 reported heavy alcohol use in the past month, and 7.8 percent reported illicit drug use. Office of Applied Studies, Substance Abuse and Mental Health Services Administration (SAMHSA), *National Household Survey on Drug Abuse* (Sept. 6, 2002) (In Brief), *available at* http://www.samhsa.gov/oas/2k2/workers/workers.pdf, at 1. According to a 1995 survey by the Gallup Organization, commissioned by the Institute for a Drug-Free Workplace, 35% of employees surveyed responded that they were aware of illicit drug use by their co-workers on-the-job. Institute for a Drug-Free Workplace, *What American Employees Think About Drug Abuse* (1995) (Figure 13: Awareness of On-The-Job Illicit Drug Use By Co-Workers), *available at* http://www.drugfreeworkplace.org/survey/page23.html.

reputation, and promote an atmosphere that is conducive to retaining good employees. No termination will ever be final. In addition, the Ninth Circuit's rule also has the consequence of placing employers in the untenable position of having to consider for rehire former employees who present a known and demonstrated hazard.

The decision below thus undermines the best practices of good employers, who maintain progressive discipline procedures that give employees every chance to succeed. It also counteracts those efforts of good employers who, as Hughes did here, provide and pay for rehabilitation for substance-abusing employees and resort to termination only after such efforts fail.

CONCLUSION

We respectfully request that the Court grant the petition for a writ of certiorari and consider summary reversal.[11]

Respectfully submitted,

ANN ELIZABETH REESMAN *
MCGUINESS, NORRIS & WILLIAMS, LLP
1015 Fifteenth St., NW
Suite 1200
Washington, DC 20005
(202) 789-8600

*Counsel of Record

December 13, 2002

[11] For the reasons set forth in the Petition, *amicus curiae* EEAC strongly supports Petitioners' position that this case is particularly appropriate for summary reversal.

Supreme Court, U.S.
FILED
MAR 9 2003
OFFICE OF THE CLERK

(12)

No. 02-749

IN THE

Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

STEPHEN G. MONTOYA
Counsel of Record
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PETITION FOR CERTIORARI FILED NOVEMBER 12, 2002
CERTIORARI GRANTED FEBRUARY 24, 2003

99 pp

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Appendix K — Determination Of The U.S. Equal Employment Opportunity Commission, Phoenix District Office Dated November 20, 1997 ..... 93a

The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear in the appendix of the Petition for a Writ of Certiorari on the following pages:

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Order And Judgment Of The United States District Court For Tl e District Of Arizona Filed January 31, 2001 ..... 16a

APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (TUCSON)

U.S. District Court

U.S. District Court for the District of Arizona (Tucson)

CIVIL DOCKET FOR CASE #: 98-CV-319

Hernandez v. Hughes Missle System, et al.
Filed: 07/06/98
Assigned to: Judge John M. Roll
Jury demand: Plaintiff
Demand: $0,000
Nature of Suit: 440
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in other court: None
Cause: 28:1331 Fed. Question: Employment Discrimination

JOEL HERNANDEZ
plaintiff

Richard Moreno Martinez, Esq
FAX (520) 320-9090
[COR LD NTC ret]
Law Offices of Richard M. Martinez
3131 E 2nd St
Tucson, AZ 85716
(520) 327-4797

v.

Appendix A

HUGHES-MISSLE SYSTEMS COMPANY,
an AZ Corporation
defendant

Ronald J Stolkin, Esq
FAX (520) 879-6881
[COR LD NTC ret]
Barney Myer Holtzman
FAX (520) 879-6890
[COR LD NTC ret]
Fennemore Craig PC
1 S Church
Ste 1000
Tucson, AZ 85701-1627
(520) 879-6800

HUGHES AIRCRAFT COMPANY,
a Delaware Corporation
defendant

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FAX (520) 879-6881
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Appendix A

RAYTHEON COMPANY,
a Delaware Corp

defendant

Ronald J Stolkin, Esq
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7/6/98 1 COMPLAINT FILED (pb) [Entry date 07/08/98]

7/6/98 2 DEMAND for jury trial by pla (pb) [Entry date 07/08/98]

* * *

8/14/98 6 ANSWER by dft Hughes Missle System, dft Hughes Aircraft, dft Raytheon Co (bsw) [Entry date 08/17/98]

8/21/98 7 AMENDED ANSWER to [6-1] by dfts (bsw) [Entry date 08/24/98]

* * *

Appendix A

9/11/00 70 MOTION for summary judgment by dfts [70-1] (bsw) [Entry date 09/12/00]

9/11/00 71 STATEMENT OF FACTS by dft Hughes Missle System, dft Hughes Aircraft Co, dft Raytheon Company re motion for summary judgment by dfts [70-1] (bsw) [Entry date 09/12/00]

* * *

10/26/00 76 RESPONSE by pla Joel Hernandez to motion for summary judgment by dfts [70-1] (bsw) [Entry date 10/30/00]

10/26/00 77 STATEMENT OF FACTS by pla Joel Hernandez re motion in sum jgm response (bsw) [Entry date 10/30/00]

11/13/00 78 REPLY by dfts to response to motion for summary judgment by dfts [70-1] (bsw) [Entry date 11/14/00]

11/13/00 79 STATEMENT OF FACTS by dfts re reply to response to mtn for sum jgm (bsw) [Entry date 11/14/00]

* * *

Appendix A

11/22/00 82 SUPPLEMENTAL by dfts to its reply in support of their mtn for sum jgm [78-1] (bsw) [Entry date 11/27/00]

* * *

1/31/01 85 ORDER by Judge John M. Roll granting motion for summary judgment by dfts [70-1] (cc: all counsel) (kt) [Entry date 01/31/01]

1/31/01 86 JUDGMENT: by Judge John M. Roll re: order [85-1] terminating case; it is ordered that dft's mtn for summary judgment is granted; it is further ordered that judgment is entered in favor of dft's & against the plaintiff (cc: all counsel) (kt) [Entry date 01/31/01]

* * * *

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

General Docket
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 01-15512
Filed: 3/21/01
Nsuit: 3440
Contract: Other civil rights (Fed)
Hernandez, et al v. Hughes Missile Sys, et al
Appeal from: District of Arizona (Tucson)

Case type information:
1) civil
2) private
3) (null)

Lower court information:
District: 0970-4 : CV-98-00319-JMR
court reporter: Chris Calles, Court Reporter
presiding judge: John M. Roll, District Judge
Date Filed: 7/6/98
Date order/judgment: 1/31/01
Date NOA filed: 2/22/01

Fee status: paid

Prior cases: None

Current cases: None

Appendix B

JOEL HERNANDEZ
Plaintiff-Appellant

Richard M. Martinez, Esq.
FAX 520/320-9090
520/327-4797
[COR LD NTC ret]
3131 E. Second Street
Tucson, AZ 85716

v.

HUGHES MISSILE SYSTEMS COMPANY,
an Arizona corporation
Defendant-Appellee

Barney Myer Holtzman
520-879-6800
[COR LD NTC ret]
FENNEMORE CRAIG
One South Church
Tucson, AZ 85701-1627

Ronald J. Stolkin, Esq.
FAX 520/879-6801
Suite 1000
[COR LD NTC ret]
LAW OFFICES OF FENNEMORE CRAIG
One South Church Avenue
Tucson, AZ 85701-1627

Appendix B

HUGHES AIRCRAFT COMPANY,
a Delaware Corporation
Defendant-Appellee

Barney Myer Holtzman
(See above)
[COR LD NTC ret]

Ronald J. Stolkin, Esq.
(See above)
[COR LD NTC ret]

RAYTHEON COMPANY,
a Delaware Corporation
Defendant-Appellee

Barney Myer Holtzman
(See above)
[COR LD NTC ret]

Ronald J. Stolkin, Esq.
(See above)
[COR LD NTC ret]

Appendix B

JOEL HERNANDEZ
Plaintiff-Appellant

v.

HUGHES MISSLE SYSTEMS COMPANY, an Arizona a corporation; HUGHES AIRCRAFT COMPANY, a Delaware corporation; RAYTHEON COMPANY, a Delaware corporation

Defendants-Appellees

* * *

7/19/01	Filed original and 15 copies Appellant Joel Hernandez opening brief (Informal: no) 19 pages and five excerpts of record in lvolumes; served on 7/16/01 [01-15512] (dg)

* * *

8/31/01	Filed original and 15 copies appellee Raytheon Company, Hughes Aircraft Co., Hughes Missile Sys.'s 25 pages brief, 5 suppl Exc. in 1 vol: ; served on 8/29/01 [01-15512] (gar)

* * *

10/4/01	Filed original and 15 copies Joel Hernandez reply brief, (Informal: no) 11 pages; served on 10/1/01 [01-15512] (dg)

Appendix B

10/17/01 Filed motion and deputy clerk order: (Deputy Clerk: cag) Aples' motion to strike Section I.B. of aplt's reply brief and any related filing shall be referred for disposition to the panel that considers the merits of the case. [4276552-1] (Motion recvd 10/12/01) [01-15512] (dg)

* * *

2/16/02 ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Frank J. Magill, Raymond C. FISHER [01-15512] (gb)

6/14/02 FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after Oral Hearing; Reversed and Remanded; Written, Signed, Published. Stephen R. REINHARDT, author; Frank J. Magill; Raymond C. FISHER.) FILED AND ENTERED JUDGMENT. [01-15512] (dg)

* * *

7/2/02 [4471659] Filed original and 50 copies Appellee Hughes Missile Sys., Hughes Air craft Co., Raytheon Company petition for panel rehearing and petition for rehearing en banc 18 p.pages, served on 7/2/02 (PANEL & ALL ACTIVE JUDGES) [01-15512] (ru)

* * *

Appendix B

8/12/02 Filed order and amended opinion (Judges Stephen R. REINHARDT, author, Raymond C. FISHER) (Orig. opinion id: [4453472-1]) The opinion filed 6/11/02, is amended as follows: (see opinion for text). With these amendments, the panel has voted to deny the P/R & P/R en banc. [4471659-1] [01-15512] (dg)

* * * *

APPENDIX C — EMPLOYEE SEPARATION SUMMARY

COMPL. PRIVATE (WHEN COMPLETED)

EMPLOYEE SEPARATION SUMMARY

(TYPEWRITTEN MUST BE USED) YNN

VERIFIED

HUGH

PAY CD CODE	PAYROLL NUMBER	LAST NAME	FIRST	MI	SOCIAL SECURITY NUMBER	ORGN CODE
HAC	87449	HERNANDEZ	JOEL		573-48-8845	SL-35-24

EMPLOY PART TIME ☐ EMPLOY PROBATIONARY ☐ EMPLOY SEASONAL ☐

DATE PREPARED

DATE OF NOTIFICATION	LAST DAY WORKED	EFFECTIVE DATE OF SEPARATION LEAVE BOARD	PAY AREA
07/16/91	07/12/91	7-12-91	25

REASON FOR SEPARATION (MARK ONE)

- ☐ QUIT (GIVE SPECIFIC REASON)
- ☐ LAYOFF - LACK OF WORK
- ☐ LAYOFF - PHYSICAL DISQUALIFICATION
- ☐ RETIREMENT
- ☒ DISCHARGE (GIVE SPECIFIC REASON)
- ☐ DECEASED (INDICATE DATE OF DEATH) _____
- ☐ MILITARY SERVICE
- ☐ ACTIVE SERVICE

SPECIFIC REASON FOR SEPARATION:

1) DISCHARGE FOR POTENTIAL CONFLICT

(Quit in lieu of discharge HH 7/30/91)

NAME OF NEXT EMPLOYER

EVALUATION RATINGS

	EXCELLENT	GOOD	FAIR	POOR
ABILITY	☐	☒	☐	☐
CONDUCT	☐	☐	☒	☐
PRODUCTION	☐	☐	☒	☐

SUPERVISOR NAME AND INITIALS J. M. RIPPA

LOC Bld LOG N26 MAIL STATION _____ PHONE 45585

AUTHORIZING SIGNATURES

SUPERVISOR	DATE	DEPARTMENT/DIVISION	DATE
J M Ripp	7-24-91		7/24/91
DIRECTOR	DATE	MAJOR ORGANIZATION	DATE

FINAL STATUS SUMMARY

ITC DATE	JOB CODE	JOB CLASSIFICATION	REMC	ADJ TYPE	TAM	LOC	OT	BARG UNIT	TRANS	WORK WEEK	PART TIME	OUT OF TRADE AREA
7/13/91	40176	CAL SVC TECH-WL	00	34	H	313	D	1	1	40.0	N	

BASE RATE	COST OF LIVING	WAGE/SUM	TABLE AMOUNT	GRANTED AMOUNT	OTHER COMPENSATION	PAY RATE	SUB	SA	SUB	EDUCATIONAL EXTENS
16.93						16.93	00	000	00	

RACE CODE	HIRE DATE	START DATE	SERVICE DATE	BUS CODE	SEX	MED. ABSTR.	VET STAT	BIRTH DATE	AGE	SAL INS	INC INS	RATINGS	ACHIEVEMENT	AWARDS	ADJUSTMENT
HCN	07/27/66	05/26/69	11/12/67	B	M	N	N	04/23/40	51			A	A	A	N

THIS SECTION FOR HUMAN RESOURCES USE ONLY

SICK LEAVE ACCRUED	SICK LEAVE PROBATED	NORMAL VACATION (NVA) ACCRUED	NORMAL VACATION (NVA) PROBATED	EXCESS VACATION (EVA) ACCRUED	EXCESS VACATION (EVA) HOURS DATE	PICK UP PAY HOURS	SAS	SSS	EMP SOC	MERS EMPLOYER CODE	ACTIVITY CODE
0	0	48.0	0	0	0						SVL

REMARKS:
APPROVED FORM MUST BE RETURNED TO EMPLOYEE RECORDS WITHIN 5 DAYS OR NO LATER THAN 3 DAYS PRIOR TO TERM DATE IN ORDER FOR EMPLOYEE TO RECEIVE MONIES DUE.

HUMAN RESOURCES _____ DATE 7/24/91

DISTRIBUTION: 1. White—MASTER FILE; 2. Goldenrod—UTILITY; 3. Pink—UNEMPLOYMENT OFFICE; 4. Blue—DEPARTMENT

COMPANY PRIVATE (WHEN COMPLETED)

RC0001

J. HERNANDEZ Depo. Exh. # 15

Robin E. Hunt, Notary Public
Date 8/20/91

888A CS FEB 87

BEST AVAILABLE COPY

APPENDIX D — LETTER FROM HECTOR SIQUEIROS, PASTOR, DATED APRIL 2, 1993

Latin Free Methodist Church
1702 N. Mohave Avenue, Tucson, Arizona 85745
(602) 623-1694

April 2, 1993

RE: Joel Hernandez

Dear Personnel Management:

With this letter I, Hector Siqueiros, pastor the Latin Free Methodist Church would like to recommend Mr. Joel Hernandez to your facilities.

Mr. Hernandez has assisted our church since August of 1992 and was baptized on October 11, 1992. He has been a faithful and active member of the church along with good rapport with the other members.

I you have any questions regarding Mr. Hernandez, do not hesitate to contact me at your earliest convenience.

Very truly yours,

s/ Hector Siqueiros
Hector Siqueiros
Pastor

APPENDIX E — LETTER FROM JOHN L. LYMAN, M.S., DATED APRIL 26, 1993

April 26, 1993

John L. Lyman, M.S.
4839 W. Spoonbill Dr.
Tucson, Az. 85741
(602) 579-0824

Gentlemen:

I have known Mr. Hernandez for almost a year. I have seen him occasionally at his place of employment and frequently at meetings of Alcoholics Anonymous.

I have worked with recovering alcoholics for ten years and have screened people for the New Hampshire Department of Motor Vehicles and referrals from state and federal parole boards, among my other duties.

I volunteered to write you in behalf of Joel Hernandez as I have seen steady and consistent progress in his recovery from this disease.

Joel attends A.A. regularly, participates in discussion when appropriate, is maintaining his sobriety and is in all a good and active member.

Alcoholics Anonymous has clearly been demonstrated as the best recovery tool for alcoholics and Joel's commitment to the program demonstrates to me his willingness to accept responsibility for his recovery.

Appendix E

In summary, I would heartily recommend Joel Hernandez for any position for which he is qualified. He is a diligent and caring individual who seems to merit a second chance.

You may, if you wish, contact me at home for further information since I am not currently in formal practice due to health reasons.

Sincerely,

s/ John L. Lyman, M.S.
John L. Lyman, M.S.

APPENDIX F — LETTER FROM HUGHES MISSILE SYSTEMS COMPANY, DATED JULY 15, 1994

HUGHES
HUGHES MISSILE SYSTEMS COMPANY

July 15, 1994

Equal Employment Opportunity Commission
Phoenix District Office
4520 N. Central Avenue
Phoenix, Az 85012-1848

Attention: Mary Ann Cantor

Re: Joel Hernandez v. Hughes Aircraft [Hughes Missile Systems Company]
Charge No. 350941479

Dear Ms. Cantor:

Hughes Missile Systems Company, hereinafter referred to as "HMSC," is in receipt of the charge of disability discrimination filed by Joel Hernandez, hereinafter referred to as "Complainant," in which he alleges he was discriminated against on the basis of his disability.[1] Complainant's Charge fails to indicate the nature of his disability and HMSC is unaware of any medical condition which would qualify him

1. Mr. Hernandez erroneously named Hughes Aircraft as his employer. Mr. Hernandez was employed by Hughes Missile Systems Company, a subsidiary of Hughes Aircraft Company (HMSC). This response is prepared on the behalf of HMSC.

as being disabled under the Americans with Disabilities Act. ("ADA"). HMSC categorically denies that it discriminated against Complainant on the basis of a disability or for any other discriminatory motive.

BACKGROUND

Complainant began working at HMSC on July 27, 1966, as a janitor. At the time of his termination Complainant held the position of Calibration Service Technician. Other positions held by Complainant at HMSC include Maintenance Helper, Tester Electronic, Assembler and Tester Functional. Complainant was represented by Bargaining Unit No. 1, of the International Association of Machinists and Aerospace Workers and his employment was governed by a collective bargaining agreement.

On August 7, 1986, Complainant was going to be terminated due to excessive absenteeism. However, Complainant advised his union, management and Labor Relations that he had an alcohol problem which resulted in excessive absenteeism. Therefore, Complainant was offered the option to either enter an alcohol treatment center or be terminated. Complainant chose to enter the thirty day treatment center. In treatment it was determined that Complainant was both alcohol and cannabis dependent and that he was a cocaine user/abuser. Upon his release from the center he returned to work at HMSC.

In 1989, the Company implemented it's Drug Free Workplace Program (Company Practice 3-0-17) which provides for both pre-employment and reasonable suspicion drug and alcohol

testing. Under the terms of the program, the Company may require an employee to submit a blood and/or urine sample for alcohol and drug testing whenever there is a reasonable suspicion that an employee's declining work performance or erratic on the job behavior may be affected by alcohol or drug use (See Attachment A).

On July 11, 1991, Complainant arrived at work demonstrating signs of aberrant behavior including bloodshot eyes, unsteady gait and slurred speech. Consistent with Company Practice 3-0-17, Complainant was required to undergo drug testing. On July 15, 1991, the results of the urinalysis test indicated a positive test for the presence of cocaine. Complainant resigned in lieu of being discharged.

RESPONSES TO ALLEGATIONS CONTAINED IN CHARGE OF DISCRIMINATION

I. On 01-27-94, I applied for one of seven positions as Product Test Specialist and was not hired.

HMSC is in possession of Complainant's application/resume that is both date stamped as received and signed by Complainant on January 27, 1994. Complainant's application indicated that he was interested in a position as Product Test Specialist as well as Electronic, Tester and Calibration Service Technician. HMSC agrees that Complainant has not been offered a position of employment.

II. I have not been [given] a reason for my non-selection.

As a matter of practice, HMSC does not contact unsuccessful applicants to inform them that they have not been selected for a particular position unless the applicant has been interviewed. Complainant's application was received but he was not offered the opportunity to be interviewed for a position.

III. I believe I have been discriminated against in violation of the Americans with Disabilities Act of 1990.

HMSC denies that Complainant was discriminated against in violation of the Americans with Disabilities Act or any other unlawful basis. The ADA prohibits discrimination against a "qualified individual with a disability." The ADA specifically exempts from protection individuals currently engaging in the illegal use of drugs when the covered entity acts on the basis of that use.[2] Contrary to Complainant's unfounded allegation, his non-selection for rehire is not based on any legitimate disability. Rather, Complainant's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.

---

2. Section 1630.3(b) of the ADA provides that the term "disability" and "qualified individual with a disability" may not exclude an individual who: has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs; or an individual who is participating in a supervised rehabilitation program and is no longer engaging in such use. However, this provision is not applicable in this situation as Complainant has provided no evidence to demonstrate he has cither successfully completed or is currently undergoing drug rehabilitation.

Appendix F

The Company maintains it's right to deny re-employment to employees terminated for violation of Company rules and regulations. Complainant was discharged for violation of Company Rule and Regulation No. 7, "(u)nauthorized or unlawful manufacture, distribution, dispensing, sale, possession, consumption, use or being under the influence of alcohol, a controlled substance or illegal drug during working time, while performing work for the Company or at any time on Company premises; **or testing positive for alcohol or drugs on a *test* requested by the Company.** (Emphasis added.) Complainant elected to resign in lieu of discharge. Complainant has provided no evidence to alter the Company's position that Complainant's conduct while employed by HMSC makes him ineligible for rehire.

CONCLUSION

Based on the foregoing facts, there is clearly no evidence to support Complainant's charge of discrimination. Therefore, it is the position of HMSC, that the charge of discrimination should be dismissed in its entirety. Should you need any additional relevant information, please do not hesitate to contact Gioia Sita at (602) 794-9850.

Sincerely,

Hughes Missile Systems Company

s/ George M. Medina, Sr.
George M. Medina, Sr.
Manager Diversity Development
EEO/AA Programs

APPENDIX G — AFFIDAVIT OF JOANNE BOCKMILLER, DATED JUNE 27, 2000

AFFIDAVIT OF JOANNE BOCKMILLER

STATE OF RHODE ISLAND)
) ss
County of Newport)

Joanne Bockmiller being first duly sworn, under oath, states:

1. I am over the age of 18 and a resident of the State of Rhode Island.

2. I make this affidavit based upon personal knowledge and a review of Hughes Missile Systems Company's nka Raytheon Missile Systems Company ('Raytheon") personnel file for Joel Hernandez.

3. In late January and early February 1994, I worked for Raytheon at its Tucson Arizona facility in the Labor Relations Department.

4. At that time, my name was Joanne Schoch.

5. I officially have changed my name to Joanne Bockmiller.

6. As part of my duties in the Labor Relations Department, and from time to time, I would review applications submitted by former employees to determine if they were eligible for rehire.

Appendix G

7. In late January or early February 1994, the Staffing Department forwarded to me Mr. Hernandez's January 24, 1994 application.

8. Upon receipt of that application, I reviewed the Employee Separation Summary that was contained in Mr. Hernandez's personnel file.

9. Because the Employee Separation Summary states that Mr. Hernandez was "Discharge for personal conduct (Quit in lieu of discharge)," pursuant to Raytheon's practice or policy as I understood it, I made the decision that Mr. Hernandez was not eligible for rehire.

10. At the time Mr. Hernandez's application was denied, Raytheon's practice or policy was that former employees who had been terminated, or quit in lieu of termination, for violating company policies were not eligible for rehire.

11. In late January or early February 1994, I had never met Mr. Hernandez, I did not know him and I did not know anything about his prior employment with Raytheon.

12. At the time I concluded that Mr. Hernandez was ineligible for rehire, I did not know why he quit in lieu of being discharged or what the personal conduct was that was referenced in his Employee Separation Summary.

DATED this 27 day of June, 2000.

s/ Joanne Bockmiller
Joanne Bockmiller

Appendix G

SUBSCRIBED AND SWORN TO BEFORE ME this 27th day of June 2000 by Joanne Bockmiller.

s/ Barbara C. McCarthy
Notary Public
My commission expires: 6/28/01

APPENDIX H — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED AUGUST 20, 1999

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

CIV98-319 TUC JMR

JOEL HERNANDEZ,

Plaintiff;

vs.

HUGHES MISSILE SYSTEMS COMPANY CORPORATION, an Arizona corporation; HUGHES AIRCRAFT, CO., a Delaware corporation, RAYTHEON, CO., a Delaware corporation,

Defendants.

DEPOSITION OF JOEL HERNANDEZ

DATE TAKEN: AUGUST 20, 1999

Appendix H

[Commencing at page 22]

• • •

BY MR. STOLKIN:

• • •

Have you had a chance to review Exhibit No. 4, Mr. Hernandez?

A. Yes, sir.

Q. Do you recognize that document?

A. Yes, sir.

Q. For the record, this is a document to you from Mr. Beagles, again dated October 30, 1985 regarding a final written warning, absenteeism; is that correct?

A. Yes.

Q. With regard to the absences that we've talked about just in Exhibits 3 and 4, do you have any recollection as you sit here today about the absences themselves — did you fail to show up for work at all; did you call in late and say you wouldn't be in there; no call, no show — do you remember?

A. All of the above.

Appendix H

Q. All of the above. After this warning of [23] October 30, 1985, final written warning, did you correct your absenteeism problem?

A. If I recall correctly, meeting with Dick Dupree, I believe I was referred to treatment.

Q. Who's Dick Dupree?

A. He's the psychologist.

Q. For the company?

A. Yes.

* * *

Q. At the time that you were referred to [24] treatment, was that one of two options that you had at the time?

A. I don't recall.

Q. Do you recall that you were on the verge of being terminated or in lieu of termination, instead of being terminated, you could choose to seek help?

A. That is correct.

Appendix H

Q. Hughes at the time told you that because the problem continued you were going to be fired unless you were willing to try to help yourself?

A. Yes.

Q. If I told you that that probably took place in or around August of 1986, would you have any reason to disagree with that?

A. No.

Q. Let me show you what's been marked as Exhibit No. 5.

MR. MARTINEZ: I think this has been previously disclosed, hasn't it?

MR. STOLKIN: Yes, it has.

MR. MARTINEZ: I don't see a Bates number on it. Everything you've always given me is Bates numbered, that's why. . . .

MR. STOLKIN: It may not have come out on the copy, either. I'd give you an answer, but Jane [25] took the day off.

MR. MARTINEZ: I won't assume the worst of you, Counsel. I'll allow you to continue asking questions on this very poor copy.

Appendix H

BY MR. STOLKIN:

Q. Have you seen this document, Mr. Hernandez?

A. No, I haven't seen it.

Q. Do you see your name in the upper left?

A. Yes.

Q. Is the birth date correct?

A. Yes.

Q. Is your payroll number correct?

A. Yes, sir.

Q. Is that the department you worked in?

A. I believe so.

Q. Do you see in the far right the date of August 11, 1986?

A. Yes.

Q. Do you remember ever seeing an M.D., a doctor named Robert Gearhart?

A. No, I don't recall.

Appendix H

Q. In the line marked number one, do you see the diagnosis "alcohol D-E-P", which, I assume, means dependency?

A. Dependence.

[26] Q. Even though you haven't seen that, was that a correct diagnosis at this time?

A. Yes.

* * *

[27] * * *

Q. Let me show you Exhibit No. 6.

MR. MARTINEZ: I don't think we ever got this one either, Ron.

MR. STOLKIN: I have no explanation why there isn't a Bates stamp on it, but, as I said, I [28] will check with my paralegal when she returns.

BY MR. STOLKIN:

Q. Have you had a chance to look at Exhibit No. 6?

A. Yes.

Appendix H

Q. And to your recollection, have you seen that document before?

A. No.

Q. Looking at that document, the top line, it appears to relate to you, correct?

A. Yes.

Q. And on the far right there's a date of September 9, 1986. Do you see that?

A. Yes, sir.

Q. Under diagnosis it shows alcohol dependence continuous, cannabis abuse continuous, cocaine abuse continuous?

A. Yes.

* * *

[35] * * *

BY MR. STOLKIN:

Q. Between September 1986 and, let's say, March of 1991, were you part of any kind of treatment or rehab program?

A. No.

* * *

Appendix H

[36] * * *

Let me show you what's been marked as Exhibit No. 11.

A. Okay.

Q. You've had a chance to look at Exhibit No. 11?

A. Yes.

[37] Q. Have you seen that document before?

A. Yes.

Q. This appears to be a memorandum to you from E.C. L'Armee —

A. L'Armee.

MR. STOLKIN: L apostrophe A-R-M-E-E.

BY MR. STOLKIN:

Q. — a written reprimand for unsatisfactory attendance.

Do you see that?

A. Yes.

Q. Does this refresh your recollection as to whether your attendance was starting to deteriorate?

A. Yes, sir.

Q. Having had your memory refreshed by this, why don't you tell me what you recall now.

A. What I recall was that I was doing it again, what I used to do before. I was abusing drugs and alcohol.

Q. And when did that start up?

A. I don't believe it was like a start-up. I think it was a progressive thing.

Q. If you're able, how long after September of 1986 when you came out of Cottonwood was it before you started using drugs and/or alcohol again?

[38] A. Six months on occasion.

Q. Am I understanding what you just told me, then, from that point it started getting progressively worse?

A. Yes.

Q. Did it affect your attendance?

A. Somewhat.

* * *

Q. Do you know why they wrote Exhibit No. 11?

A. Because of absenteeism.

Q. Something was happening at that time that caused them to call you to talk to them. You got a verbal warning on February 11; do you see that?

A. Yes.

Q. And again you were absent on February 18 and February 23rd and then you got this written reprimand on March 5; do you see all that?

A. That's correct.

[39] Q. As you sit here today, do you recall that even after this reprimand there were problems with your attendance?

A. Yes.

Q. In July of 1991, on or about July 11, 1991, did you come to work under the influence of alcohol or with illegal drugs in your system?

A. Yes.

Q. And that was a violation of company policy?

A. Yes.

Q. Do you have any argument with the fact that the company had a policy prohibiting that kind of conduct?

A. No.

Q. Tell me about the day, July 11, 1991, when you came to work in that condition, what had you been doing before and what happened when you came to work on the 11th?

A. I was up late the night before, 'til 1:00 a.m., and probably for an hour after 1:00 a.m. drank some more beer. When I went to work I was functional in my job and we had a project for an eclipse on that day. We were setting up a demonstration to observe the eclipse, when the manager of the department came by to see it and I [40] conversed with him and he must have smelled my breath.

Q. Why do you think he must have smelled your breath; what happened next?

A. About a half-hour later a supervisor, Bill Dluehosh, came over and told me that I needed to go to the dispensary with him to do a test.

Q. Did he tell you what kind of test?

A. No, he did not need to.

Q. Why not?

A. It was obvious.

Q. Did you know in your own mind what it was about?

A. Yes.

Q. And did you and Mr. Dluehosh go to the dispensary?

A. Yes, sir.

Q. What happened next?

A. They did some testing, like DUI, ability to stand, ability to stand on one foot, bringing one finger up to your eyeball, a series of tests with a finality (sic) of urine.

Q. You gave a urine sample?

A. Yes.

Q. To your recollection, what happened next?

[41] A. They escorted me home and told me to wait for the results of the test.

* * *

Q. Going back a little bit, you said that you had stayed up late the night before or the early morning of the 11th and you had more beer, I guess, right?

A. Yes.

Q. Other than beer, did you consume any other substances?

A. Cocaine.

* * *

[54] * * *

BY MR. STOLKIN:

Q. Did you ask them if they would let you resign so that your record wouldn't show that you were fired?

A. No.

Q. Did they give you that opportunity to resign?

A. Yes.

Q. Let me show you what's been marked as Exhibit No. 15.

A. Okay.

[55] Q. Have you seen that document before?

A. I don't recall.

Q. It's an employee separation summary; is that correct?

A. Yes.

Q. And on the top line it's referring to you, correct?

A. Yes.

Q. You see in a box on the left at the top: "Reason for Separation"?

A. "Specific Reason for Separation"?

Q. No, to the left of that.

A. Yes.

Q. And what box is checked?

A. "Discharge indicates specific reason."

Q. And then to the right of that, I think the box you looked at before, it says "specific reason for discharge." Do you see that?

A. Yes.

Q. And below that it says you were being discharged for personal conduct; do you see that?

A. Yes.

Q. And did you understand the personal conduct to be the drug and alcohol use?

[56] A. Yes.

Q. In parentheses below that, dated July 30, 1991, it says: Quit in lieu of discharge.

Do you see that?

A. Yes.

Q. And that's what you were allowed to do?

A. Yes.

* * *

BY MR. STOLKIN:

Q. Are you currently employed?

A. Yes, sir.

Q. Where are you employed?

A. Marathon Resources, Incorporated.

Q. When did you start at Marathon?

A. May, 1992.

Q. All right. Between July 1991 and May of 1992, what did you do?

[57] MR. MARTINEZ: Employment?

MR. STOLKIN: Yes.

BY THE WITNESS:

A. I had no employment.

BY MR. STOLKIN:

Q. Then what did do you with your time in that period of time?

A. I looked for work and did personal projects for money.

Q. In that period of time did you go back into Cottonwood, for example?

A. No, I did not.

Q. Did you go into any kind of a treatment facility?

A. No.

Q. Did you receive any kind of treatment or care for alcohol and drug use?

A. No.

Q. Did you continue to use alcohol and drugs in that period of time?

A. Yes.

* * *

[62] * * *

BY MR. STOLKIN:

Q. Were you asked why you had left any former employer?

A. No.

Q. You sure?

A. No.

Q. So you're not sure?

A. No.

Q. Let me show you what's been marked as Exhibit No. 26.

A. Okay.

Q. The first two pages of Exhibit No. 26, is that the application that you filled out to go to work at Marathon Resources, Incorporated?

A. Yes.

Q. And that's your signature at the bottom of [63] the second page?

A. Yes.

Q. If you look on the first page, do you see where it says: Previous Employment History?

A. Yes, sir.

Q. Do you see where you reported Hughes Aircraft as your employer?

A. Yes.

Q. Do you see what you wrote as reason for leaving?

MR. MARTINEZ: Foundation.

BY THE WITNESS:

A. No. Okay. Yes.

Appendix H

BY MR. STOLKIN:

Q. Is that your handwriting?

A. Yes.

Q. What did you write?

A. Early retirement.

Q. Was that true?

A. No.

* * *

[74] * * *

Q. What is that document?

A. It's a letter of referral from the pastor of the church that I attend.

Q. And it's dated April 2, 1993, from Mr. Hector Siqueiros of the Latin Free Methodist Church, correct?

MR. MARTINEZ: S-I-Q-U-E-I-R-O-S.

BY THE WITNESS:

A. Yes.

Appendix H

BY MR. STOLKIN:

Q. Have you had a chance to review the entire letter?

A. Yes.

Q. Is there any reference in this letter to [75] rehabilitation from alcohol or substance abuse?

MR. MARTINEZ: Objection; document speaks or itself.

You can answer the question.

BY THE WITNESS:

A. No.

* * *

BY MR. STOLKIN:

* * *

Q. Mr. Hernandez, if I'm not mistaken, you had told me that between the time that you resigned in lieu of termination from Hughes in July of 1991 and the time you became employed at Marathon in May of 1992 you continued to use drugs and alcohol and did not get treatment or rehabilitation, correct?

A. Yes.

Q. After you went to work at Marathon in May of 1992 and the time you applied at Hughes in April of 1993, did you continue to use drugs and alcohol?

A. My answer will be no, except for a period between May of '92, when I hired on, to July the 4th, 1992 was the day I made my determination not to abuse anymore.

Q. What happened on July 4, 1992 that caused [76] you to stop alcohol and drug abuse or use?

MR. MARTINEZ: Calls for a narrative, but you can go ahead and answer.

BY THE WITNESS:

A. I had an experience with drug and alcohol abuse that reflected on my lifestyle and disappointment in my quality of life.

BY MR. STOLKIN:

Q. I have heard the term used for people who have drug and alcohol problems, the term "hitting rock bottom". Have you heard that term before?

A. Yes, sir.

Q. Are you telling me, without, obviously, going into detail, that whatever happened on July 4, 1992 is when you hit rock bottom?

A. Yes.

Q. What happened after this event that we're calling "rock bottom", what did you do?

A. Upon making a determination, approximately two weeks later I went to the church of my childhood, which is the church that's stated right here by Pastor Siqueiros, and together with the spiritual guidance and Alcoholics Anonymous I was successful in not having to go back to what I was.

[77] Q. When did you begin participating in AA, Alcoholics Anonymous?

A. The month of June when my boss saw me sitting down, he suggested it. In order to keep that job, I should go to meetings every day and bring him an attendance slip.

Q. So the incident that you mentioned earlier at Marathon when you were —

A. Caught.

Appendix H

Q. — disciplined or caught sitting down was related somehow to the use of alcohol and your supervisor recognized that; is that what you're telling me?

A. Yes.

* * * *

APPENDIX I — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED AUGUST 30, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 98-319 TUC JMR

JOEL HERNANDEZ,

Plaintiff,

vs.

HUGHES MISSILE SYSTEMS COMPANY CORPORATION, an Arizona Corporation; HUGHES AIRCRAFT CO., a Delaware Corporation; and RAYTHEON CO., a Delaware Corporation,

Defendants.

TELEPHONIC DEPOSITION OF JOANNE BOCKMILLER

August 30, 2000

Tucson, Arizona

Appendix I

[Commencing at page 5]

* * *

BY MR. MARTINEZ:

Q Ms. Bockmiller, do you have any documents in front of you at this time?

A Do I have any documents?

Q Yes. Any documents related to this case in front of you.

A I have a copy of the Employee Separation Summary.

Q Can you describe that document for me?

A It's a document that was completed with information with regard to Joel Hernandez' separation and it has the date of his termination and the reason for termination.

Q And what is the date indicated on that [6] document as to the date of termination?

A It has an effective date of 7/12/91 and also written in below that is a notation that "Quit in lieu of discharge" and it was signed by an individual on 7/30.

Appendix I

Q And who is the individual's signature that appears on that document?

A It has initials. It was Theresa Garcia.

Q Are there just initials there or is there actually a signature?

A There's initials T something G, but I recognize the signature on the bottom as Theresa Garcia and that's her initials.

Q That's someone you had worked with?

A Yes.

Q Is that a one-page document, ma'am, or more than one?

A One page.

Q Is that a document that you had seen before today?

A Yes.

Q When did you first see that document?

A At the point in time where I had reviewed Mr. Hernandez' application for re-hire. It was shortly after that that I had requested his personnel file, and [7] a copy of that was in his personnel file.

Q Did you see his entire personnel file?

A Yes.

Q Did you review his entire personnel file?

A I don't recall specifically if I would have reviewed every document, but I did have access to the file.

* * *

[13] * * *

Q Have you reviewed any other documents in relation to Mr. Joel Hernandez and any litigation he may have against Hughes Missile Systems?

A I have reviewed portions of the position paper that was provided to the EEOC.

Q That position statement which is in response to the charge of discrimination?

A Yes.

Q Do you still have that document?

A No, I do not.

Q And when did you last see that document or portions of that document?

A About a year ago.

Q Did you prepare any portion of that document?

A No, I did not.

Q Do you know who prepared it?

A No, I do not. I can't say for sure.

* * *

[19] * * *

Q Did you have any responsibilities at all in the area of equal employment opportunity during that seven-year period?

A No, I did not.

Q How did your job change when you became a labor relations representative?

A At that time instead of processing the administrative portion of labor relations responsibility I was responsible for working with the union stewards and union representatives, as well as management in resolving various issues, such as grievances, employee relations issues, that type of thing.

Q Were you involved in the hiring of employees at that time?

A We were involved in a portion of the hiring process.

Q What portion?

A As applications were to come in to the Staffing Department, they would do an initial screen of the applications to determine whether or not they met the requirements for the job openings that we had. Those applications then would be sent to Labor Relations [20] and we would review the applications to determine, first of all, whether or not the employee worked at the company previously and then, secondly, to review the requirements to make sure that they met the minimum requirements of the job as it was posted.

Q Did you have those responsibilities at the time that you reviewed Mr. Hernandez' application for reemployment?

A Yes.

Q And did you review his, if he met the requirements for the position or positions he was applying for?

A The initial review that I conducted was to determine whether or not he had worked at the company previously and requested his personnel file to review his prior work history. And so a determination at that time was not officially made with regard to whether or not he met the minimum requirements or not.

Q So essentially, if a person had worked previously with the company, that's the threshold inquiry that you were making?

A Correct.

Q And you never got past that threshold inquiry?

[21] A Correct.

Q Now, Mr. Hernandez in his application had indicated that he had previously worked for the company, correct?

A That's what I recall, correct.

Q And did you have available the information that he submitted as a part of his application?

MR. STOLKIN: Objection to form.

A Could you repeat that?

BY MR. MARTINEZ:

Q Yes, ma'am. When you were made aware of Mr. Hernandez' application for reemployment with Hughes were you provided a copy of any documents that he had submitted at that time?

A I don't recall. What I remember is his application. I don't recall anything else submitted with it.

Q Do you recall if any letters were submitted as a part of his application?

A I don't recall that.

Q Do you recall if he had provided any information with respect to his sobriety?

A I don't recall that.

Q Do you recall if he had provided any information with respect to his rehabilitation as to any [22] previous use of alcohol or controlled substances? Substances. Sorry, my tongue is not working quite well this morning.

A I don't recall that either.

Q If that kind of information — and this is, of course, only if you know. At the time that this review occurred was it the practice at Hughes here in Tucson to give you everything the applicant had submitted or to give you a copy of everything they had submitted?

A My understanding is that is the practice.

Q Would it be your expectation, ma'am, that if, in fact, Mr. Hernandez had submitted various documents that you would have had all of those available to you at the time of your review?

A I believe so.

Q I'm sorry. What did you say?

A I believe that's correct.

Q And prior to reviewing Mr. Hernandez' personnel file do you recall if you were already aware of his having made reference or having identified any issues with respect to sobriety or rehabilitation which would indicate to you either prior substance abuse related to alcohol or some controlled substance?

A I was not aware of that and the personnel [23] file would not indicate that information.

Q I was just asking if, based on the documents or document that you saw before you saw the personnel file, if you had received anything that indicated that to you.

A Not that I recall.

Q Where at that time would Mr. Hernandez' personnel file have been kept? Where were you retrieving it from?

A I requested the personnel file through the Staffing Department, so I'm not sure specifically where they would have gotten it from.

Q Was it provided to you?

A That's correct.

Appendix I

Q And you reviewed that file in its entirety?

A I reviewed information in the file.

Q Do you recall what you reviewed in that file?

A I remember reviewing the Employee Separation Summary.

Q Anything else?

A Not specifically, no.

* * *

[25] * * *

Q At the time that you first saw this document — and I'm assuming that the first time you saw this document is in connection with reviewing Mr. Hernandez' application for reemployment. Is that correct?

A That's correct.

Q Did you determine the specific reason as to why Mr. Hernandez was terminated or quit in lieu of discharge?

A No, I did not.

Appendix I

Q Have you learned since then the reason why he quit in lieu of discharge?

A Yes.

Q When did you learn that?

A During the process, probably about a year ago, working with George Medina as he was responding to the lawsuit.

* * *

[33] Q And assuming for the moment that at the time of reemployment Mr. Hernandez was rehabilitated — so I'm just asking you to assume that for the purpose of this question; okay — what procedure, did you have in place at the time to allow for his application to be considered for reemployment?

MR. STOLKIN: Objection, form and foundation.

A Because the individual was a quit-in-lieu-of discharge, based on the practice that we had, the individual would not be eligible for re-hire.

Q And when you say "the practice," you're talking about a verbal practice, right? You're not talking about anything in writing?

A That's correct.

Q You had no written direction telling you to do that?

A That's the practice that we had in place and, correct, it was not in writing.

Q And nobody had ordered you in writing to do that, correct?

A Correct.

Q So am I correct then in understanding that at the time that you reviewed Mr. Hernandez' application for reemployment that because of the circumstances of [34] his termination there was nothing in place to take account of the prior termination or discharge — I'm sorry — resignation in lieu of discharge having been the result of something for which he was not rehabilitated? The question is a little convoluted. Let me start over. At the time that you reviewed Mr. Hernandez' application for reemployment there was nothing in place to take account his specific circumstances, correct?

MR. STOLKIN: Objection, form.

A As far as the background information?

BY MR. MARTINEZ:

Q Yes, ma'am. Specifically, as I've said, you know, he had prior drug use that led to a resignation in lieu of discharge, he's now seeking reemployment, and has submitted documentation indicating to the company that he

was rehabilitated from drug use. And my question is that at the time you reviewed his application for reemployment, you had nothing in place to take account of those specific circumstances, correct?

A He was basically treated the same as we would anybody else who had been terminated or quit in lieu of discharge and was not eligible for re-hire.

* * *

[43] * * *

. . . Did you understand at the time that Mr. Hernandez sought reemployment with Hughes that [44] his history of drug and alcohol use should not be a basis or the only basis to disqualify him for employment or reemployment with the company?

MR. STOLKIN: Same objection as last.

A At the time that I reviewed his application I was not aware of his history.

BY MR. MARTINEZ:

Q That wasn't my question, ma'am. My question is: Did you understand at that time that drug or alcohol history was not a consideration that should be made? Or a factor that should be considered.

MR. STOLKIN: Form and foundation.

A Specifically with him?

BY MR. MARTINEZ:

Q With anyone with that history.

A If it was a new applicant, it would not be an issue.

Q So it's only an issue if you're an old applicant or a former employee?

MR. STOLKIN: Objection, form.

A A former employee that had been terminated from the company.

BY MR. MARTINEZ:

Q And in this case, for drug or alcohol use?

A In this case I wasn't aware of it at the [45] time.

* * *

As a labor relations representative did you have access to medical records of an employee or former employee?

A No, we did not.

Q Did you request any medical records pertaining to Mr. Hernandez?

A No, I did not.

* * *

[46] * * *

Q When you made the determination in this case did you do that in writing?

A I recall putting a note on a small yellow Post-it note.

Q Have you seen that note?

A Not recently.

Q Have you seen a copy of it?

A Probably a year ago.

Q And what did you see it on? Was it by itself or on part of another document?

[47] A I don't recall specifically.

Q Do you recall on what document you placed the Post-it note?

A Not specifically.

Q Do you recall what you wrote on the note?

A It was words to the effect that the individual should not be considered for re-hire.

Q And to whom were you addressing that note?

A It would have been to the staffing recruiter.

Q And who was that?

A That's the individual that was only there for a short time.

Q And the reason you were saying he should not be considered for re-hire was because of the previous resignation in lieu of discharge?

A That's correct.

Q Did you discuss that determination with anyone prior to making it?

A Not that I can recall.

Q Did you consult with George Medina prior to making that determination?

A No, I did not.

* * *

[48] * * *

Q Did you have any other involvement with respect to Joel Hernandez and his employment with Hughes? Or I should say his application for reemployment with Hughes.

A Not that I'm aware of.

Q Did you ever meet him?

A No, I did not.

Q Did you ever ask him any questions about his application for reemployment?

A Not that I recall.

Q So there was no communication between the two of you, is that correct?

A Right.

* * *

[49] * * *

Q At the time that Mr. Hernandez sought reemployment with Hughes did you know if he was a person who was still drinking to the point of abusing alcohol in a manner we might describe as an alcoholic?

A I had no knowledge of that.

Q Did you have any information that indicated to you at the time that you reviewed Mr. Hernandez' application for reemployment that he was abusing any substances?

A I had no knowledge of that.

* * *

[53] * * *

Q Did you have any role in responding to Mr. Hernandez' charge of discrimination?

A No, I did not.

* * *

[54] A Not that I recall.

Q Did you provide him any documents?

A Not that I recall.

Q What else did he tell you?

A That's all that I really remember at this point, is that there was an issue. And we may have had discussions with regard to certain pieces of information in the case.

Q What information?

A For instance, reviewing the application and separation summary.

Q What else?

A That's all I can recall at this point.

Q Have you spoken with Mr. Medina since then?

A I had gotten a call a few months ago and he had indicated that I may be contacted as a result of his deposition.

Q What did he tell you at that time?

A That was basically it; that he had provided a deposition and my name had come up during the process and I may be contacted.

* * * *

APPENDIX J — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED APRIL 12, 2000

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

No. CIV-98-319-TUC-JMR

JOEL HERNANDEZ,

Plaintiff,

vs.

HUGHES MISSILE SYSTEMS COMPANY CORPORATION, et al.,

Defendants.

DEPOSITION OF GEORGE MEDINA

April 12, 2000

Tucson, Arizona

Appendix J

[Commencing at page 17]

* * *

BY MR. MARTINEZ:

* * *

Q. Did you investigate Mr. Hernandez's charge of discrimination?

MR. STOLKIN: Objection; form and foundation.

THE WITNESS: No, I didn't, Richard.

BY MR. MARTINEZ:

Q. You did prepare a position statement?

A. No, I did not prepare it myself.

Q. It was prepared for you?

A. Well, it wasn't prepared for me specifically.

Q. You did sign a position statement?

A. No, I didn't. I didn't sign a position statement at all.

Q. Was it signed on your behalf?

A. That's correct. It was signed by a lady [18] named Gioia Sita. S-I-T-A is her last name.

Q. J-O-Y-A?

A. I believe it is G-I-O-I-A. It is on the position paper.

Q. And what position did Ms. Sita have with the company?

A. She was a contract worker working in my department.

Q. What does that mean, contract worker?

A. She wasn't a regular employee in the sense that I was a regular full-time employee. She was a temporary employee, if you will.

Q. And what were her responsibilities with respect to preparing the position statement specific to Mr. Hernandez's case?

A. Specifically to Mr. Hernandez's case she was responsible for investigating the charge of employment discrimination and responding to the EEOC with a position paper.

Q. Did you review that position statement prior to it being submitted?

A. I believe I did.

Q. Did you review any investigation?

A. That I do not recall specifically sitting down and reviewing documents. More likely I would have [19] talked to her regarding her investigation.

Q. At the time that Ms. Sita was charged with investigating the matter, do you believe she was competent to conduct such an investigation on behalf of Hughes?

A. I think so.

Q. Do you believe she was competent to undertake an investigation concerning the Americans with Disabilities Act?

A. I think so.

Q. And did you believe that she was in a position to recognize if, in fact, there had been rejection of Mr. Hernandez's application based solely on his employment history with the company?

MR. STOLKIN: Objection; foundation.

THE WITNESS: Yes, I think she would have been competent to recognize that.

Appendix J

BY MR. MARTINEZ:

Q. And that's, in fact, what happened in this case, correct?

A. Which part?

Q. Mr. Hernandez's application for employment with Hughes in 1994 was rejected based exclusively on his employment, prior employment history with Hughes?

[20] A. That's correct.

Q. And the specific part of that employment history that caused his application in 1994, January of 1994, to be rejected was the fact that he had previously had issues concerning alcohol and/or drug abuse?

A. I don't agree with that statement you made.

Q. Okay. What do you disagree with or what part of that statement do you disagree with?

A. It was my understanding his application for employment was rejected because he had been essentially terminated from Hughes Aircraft Company for a violation of company policy.

In this particular case, yes, it did deal — the violation did deal with the use of drugs and alcohol but his application would have been rejected had he been fired for stealing or fighting or anything like that.

Appendix J

Q. Are you saying that at the time of Mr. Hernandez's termination from employment that he was from that point on considered ineligible for reemployment?

A. Yes.

* * *

[46] * * *

Q. [D]o you agree, sir, that Mr. Hernandez's application for employment in January of 1994 was rejected specifically because of his record of past alcohol and drug use?

A. No, I don't agree with that, Richard.

Q. And do you agree that that's the underlying reason?

A. No, sir, I don't.

Q. Well, do you believe that there is any policy of Hughes Aircraft Company that Mr. Hernandez violated, other than his past use of alcohol or drug use?

A. I'm not aware of any.

Q. And the rejection of the application then was because of the belief that that past alcohol and drug used violated company policy?

A. Yeah. He had violated company policy because of the alcohol and drug use.

Appendix J

Q. And that's the reason?

A. That's the violation.

Q. And that's the reason for the rejection [47] of the application?

A. The rejection of the application was because he had been, like I said, fired, essentially.

At the time and currently our practice has always been if you're fired that we don't rehire you back. I guess that's redundant, rehire you back, but we don't rehire you.

Q. Not eligible for rehire?

A. I guess that's another way of putting it.

Q. And just so I'm clear, when you say "fired," you're using that term to include resignation in lieu of discharge, correct?

A. That's correct, in lieu of discharge.

Q. And you're then treating that as a part of the practice that you have identified earlier this morning, which is not to hire or not to treat a person as eligible for rehire?

A. Yes, sir.

Appendix J

Q. And in this case we agree the company policy violated by Mr. Hernandez is exclusively on his past alcohol and drug use, correct?

A. Right.

* * *

[50] * * *

. . . [P]art of the rationale that was offered to the EEOC of this case, that Mr. Hernandez years before had had his two bites of the apple, correct?

A. Yeah. That, I believe, was mentioned in the responses to the EEOC, yes.

Q. And irrespective of his rehabilitation that he would not be given the opportunity to have, quote, "another bite of the apple," right?

A. I'm not sure how that language was put in our responses to the EEOC, but essentially we argued that, hey, he violated company policy and we just don't bring back people who have been discharged, and we just don't bring them back.

Now, that may have made some reference to his history, for history sake, in terms of responding to the EEOC.

* * *

Appendix J

[74] * * *

Q. Who was the person that made a decision that Mr. Hernandez was not eligible for reemployment?

A. From what I understand, it would have been Joanne Bockmiller, formerly Schochi, S-C-H-O-C-H-I, I guess. I'm not really sure of the spelling.

Q. Is she still with the company?

A. Yes.

Q. In what position?

A. I believe she is a manager back east some place, I think, in Rhode Island.

Q. What position was she in in 1994?

A. I believe she was a labor rep at the time.

Q. Do you know what department she works in today?

A. Human resources, but I don't know what missile unit. I don't know what business unit.

Q. Was she the recruiter?

A. No. She was a labor rep working in the labor relations.

Appendix J

Q. And what was — how would the decision — let me ask it this way.

In 1994 was a labor rep vested with the. . . .

[75] * * *

Q. So she [Bockmiller] had a role in screening?

A. Right.

Q. In this case I think we agree that the screening included reviewing Mr. Hernandez's personnel jacket because he had indicated he had been a prior employee of the company?

A. That's my understanding, yes.

Q. And that would have then brought out the information about his prior resignation in lieu of discharge?

A. That's correct.

Q. And the two instances testing positive for drug use?

A. That I'm not sure of. I don't think so but I'm not sure.

Q. And why do you say, "I don't think so?"

A. Because that might be information that's not in the personnel jacket, which is a red color.

Q. It might be considered confidential information that is kept somewhere else?

[76] A. Possibly.

Q. Would the personnel jacket at least include the reason for resignation in lieu of termination?

A. It may of had some reference to violation of company policy. I don't remember. I'd have to take a look at the separation document.

Q. Would the separation document be in a personnel jacket?

A. Correct.

* * *

[77] Q. What did she tell you?

A. To the best of my recollection, what she told me was that she probably did, in fact, tell staffing that this person should not be rehired based on the fact that he had been discharged or quit in lieu of discharge.

Q. Okay. Did she tell you she knew the basis for the resignation in lieu of discharge?

A. No, she didn't know the basis of it.

Q. She didn't know that it was drug or alcohol related?

A. To my understanding, that's right, she did not know that.

Q. Why would she not have known that?

A. I don't know.

MR. STOLKIN: Objection; foundation.

THE WITNESS: I don't know.

BY MR. MARTINEZ:

Q. Did you discuss that with her?

A. I don't remember discussing that specifically with her. I can speculate, if you'd like.

MR. STOLKIN: I'll instruct you not to speculate.

THE WITNESS: Okay. Well, then I don't [78] know.

BY MR. MARTINEZ:

Q. Would she have read the personnel jacket?

A. That I don't know, Richard.

Q. Would she have access to it?

A. Yes.

Q. Because she is authorized to review Mr. Hernandez's personnel jacket?

A. Correct.

Q. What was your understanding of the labor representative's responsibilities in the screening process at that time?

A. Just essentially that staffing might give them a call saying that we got this person who is applying for the position who says that they were hired here or they had worked and that they had worked here previously, any reason we shouldn't consider the application any further.

And, again, they would take a look at the personnel jacket to determine whether or not we would rehire them, give them further consideration. And if they had been fired before, we're not going to rehire them, which is what happened in the Hernandez case.

And, like I said before, had he been fired for stealing or some other company violation, [79] Joanne probably would have arrived at the same determination, do not consider for rehire.

Q. Is there any circumstances where an employee who suffers from a disability that somehow leads to their termination from employment is reviewed as to the role of that disability in considering an application for reemployment?

A. Well, I guess I would hope that a person with a disability wouldn't lead to some kind of termination, that we would catch that before that. In fact, if they came forward and said they needed some kind of special accommodation, we would review that. Maybe I misunderstood your question.

Q. Let's take the specific example of Mr. Hernandez. I think we previously agreed that his circumstances he had a history of active drug use, correct?

A. It is my understanding, right.

Q. I think we agreed that was a disability from which he suffered, correct?

MR. STOLKIN: Objection; foundation.

THE WITNESS: I don't know how to answer that, Richard. He had a history of it, I'll admit. I don't know if he ever recovered or he is still a user. I don't know.

* * *

Appendix J

[81] * * *

Q. . . . .

MR. STOLKIN: Objection; form.

. . . .There is an opportunity to self identify if you have a disability. So if he wanted to identify himself as a person with a disability, he would have had that opportunity.

BY MR. MARTINEZ:

Q. Let's explore that for a minute.

Had Mr. Hernandez identified himself as a person with a disability, had he indicated he had a history of drug and/or alcohol abuse?

A. I don't know if he did or not.

Q. Had he, would he have been allowed to go forward in the hiring process?

A. I think our position would have been, hey, look, he had violated company practice, policies, rules, whatever, and our practice has always been that they don't get reemployed.

Q. And the practice has no exceptions?

A. To my knowledge, no.

* * *

Appendix J

[109] * * *

Q. Come back, reapply, am successful this time, successful with my drug and alcohol screening, that even though I tested positive 12 months before, I may or may not have to comply with number six, which is to have a medical or employee counseling screening to determine that I am successfully recovered?

A. I agree with that statement.

Q. Because it is not clear that one would even have to do that even though 12 months before I had been unsuccessful, correct?

A. Right.

Q. Now, on that portion of policy 3-0-17 that references employees, it states that if they test positive after they have been employed that there will be a determination made as to whether the employee should be discharged or offered the option of formal employee counseling, correct?

A. Correct.

Q. It also states that if one refuses counseling that the employee will be terminated, correct?

A. That's correct.

Q. And even if an employee is recommended for counseling, they still, in addition to the [110] counseling, may be subject to discipline for any incident that results in their having medical testing, meaning drug or alcohol screening, correct, number 10?

A. That's right.

Q. And also failure to comply with the testing procedures can or will result in termination, correct?

A. Yes.

Q. This portion of the practice that I've just read from, items 7 through 10, does not state anywhere that if an employee, in fact, is terminated, they are not eligible for rehire, correct?

A. That's correct.

Q. Is there anywhere in this possible, Mr. Medina, a provision or text that provides that an employee who is terminated for drug or alcohol abuse is not eligible for rehire?

MR. STOLKIN: Objection; form.

THE WITNESS: I do not believe so. I didn't see anything like that.

BY MR. MARTINEZ:

Q. Can you tell me, sir, why Hughes has a written practice that provides for an applicant who has tested positive for drugs or alcohol or both to be eligible for hiring 12 months later and has an informal [111] or verbal practice that if you were terminated for such, you're not eligible for reemployment at any time?

MR. STOLKIN: Objection; form and foundation.

THE WITNESS: Richard, I can't tell you why because I wasn't involved in drafting these policies or the practice that we discussed.

BY MR. MARTINEZ:

BY MR. MARTINEZ:

Q. Has anybody ever offered you a rationale for that?

A. No, sir.

Q. Have you ever questioned why that difference in treatment of employees versus applicants?

A. No, I've never questioned it.

Q. You'd agree with that, that they treat applicants different than former employees?

MR. STOLKIN: Objection; foundation.

BY MR. MARTINEZ:

Q. The distinction between this written practice 3-0-17 and the —

MR. STOLKIN: Form and foundation.

THE WITNESS: I don't know about the contradiction.

BY MR. MARTINEZ:

Q. I didn't say "contradiction."

[112] A. In my opinion, I think we're talking about apples and oranges.

Q. Does it treat them different?

MR. STOLKIN: Same objection.

THE WITNESS: I don't think it is really clear. Certainly the language is not similar, and I guess I got to say that after rereading it a little bit that while the language is a little different, I think it gives the employees the same type of break as it gives applicants in the sense that we do give our employees an opportunity to get counseling.

I mean, that's what the language says. The applicant gets a break here as well with respect to employment, so I don't believe one gets a better break than the other.

BY MR. MARTINEZ:

Q. That wasn't my question.

A. I understand.

Q. My question was, are they treated different, former employees seeking reemployment versus an applicant who has never worked for Hughes before?

MR. STOLKIN: Objection; form, asked and answered.

THE WITNESS: Again, I guess I'll just go back to my previous answer. It is obvious there is a [113] language difference in the policy itself, so, technically, yes, they are treated a little differently.

BY MR. MARTINEZ:

Q. Is there any discretion on the part of human resources with respect to an applicant's eligibility for reemployment after the passage of 12 months between a positive drug test or alcohol test and that subsequent application and a negative drug test or alcohol screen?

A. I don't know. I'd have to read this practice a little bit.

Q. Well, let me ask you this, do you see under applicant's —

A. Yes.

Q. — it would appear to me that there is no discretion if I tested positive, as any applicant tested positive, they have a waiting period of 12 months before they can apply again and be considered eligible for hire?

A. I agree.

Q. It is not discretionary?

A. That's right.

Q. At the same time, once the 12 months have passed I am automatically eligible, correct, for [114] consideration?

A. That's right.

Q. And I take it that there is not one of these informal practices or verbal practices to eliminate those individuals, correct?

A. Not as far as I know. I don't have any knowledge of that.

Q. So it is not like being a former employee I will be considered, right?

A. Uh-huh, that's right.

Q. I mean, I will go forward. I have my application and there is a testing phase. If I'm successful there, I go on to the interview phase. If I'm successful there, I get my job offer and I still have to pass the medical phase, correct?

A. Correct.

Q. And if I've put in a letter, like the one Mr. Hernandez did from Mr. Lyman, then I am subject to a medical or employee counseling screening to determine if I am successfully recovered, correct?

A. Yes.

Q. So all of those things happen automatically, correct?

A. Yes, sir.

Q. But if I'm an employee like Mr. Hernandez [115] and have checked off or identified that I am a former employee, then those automatic steps will not happen, correct?

A. Yes, but only if there is a legitimate rationale or reasons as to why he should not be reemployed.

Q. Well, do you have a reason why — strike that.

Do you know why former employees who test positive for drugs or alcohol are not treated the same as applicants?

A. No.

Q. Would you agree with me, sir, as to any applicants seeking employment with Hughes, including former employees, that the procedure identified in paragraph number six of policy 3-0-17 would not only provide Hughes adequate opportunity, but all information needed to determine if, in fact, that person was drug and alcohol free and was successfully recovered?

MR. STOLKIN: Objection; form and foundation.

THE WITNESS: Yeah, I would agree with you.

(Exhibit 6 marked for identification.)

[116] BY MR. MARTINEZ:

Q. Let me show you what has been marked as Exhibit 6.

Once you've had an opportunity to read it my first question is, is this a document with which you're familiar?

A. It looks familiar to me.

Q. It is stamped "company private." Do you see that?

A. Yes, sir.

Q. Does that indicate to you that this was a document that Hughes had or Hughes Missile Systems had?

A. Yes.

Q. And what is the significance of being stamped "company private"?

A. It just means that the information contained is sensitive and it is just to handle it very, very carefully.

Q. Do you know where information of this type is kept?

A. I believe this either would have been in the medical folder or the employee counseling folder.

Q. Is this the kind of documentation that the company would keep on an employee who had been referred to counseling as a result of drug or alcohol [117] abuse?

MR. STOLKIN: Objection; foundation.

THE WITNESS: If the employee gave, I guess, the doctor permission for that information to come to us, yes.

BY MR. MARTINEZ:

Q. While for it to be in the company file, I take it even if it is the medical file or the counseling file, I'm assuming it is there by consent of Mr. Hernandez?

MR. STOLKIN: Foundation.

THE WITNESS: That would be my assumption as well.

Appendix J

BY MR. MARTINEZ:

Q. You don't believe that the company is putting information in the file about Mr. Hernandez that they don't have permission to have; is that correct?

MR. STOLKIN: Objection; form and foundation.

THE WITNESS: That's correct.

BY MR. MARTINEZ:

Q. This indicates the medical summary diagnosis of Mr. Hernandez, correct?

A. Yes, sir.

[118] Q. And at a minimum the medical department with respect to Mr. Hernandez would know that he had a history of alcohol dependency, correct?

A. Yes.

Q. Cannabis dependency, continuous, correct?

A. That's correct.

Q. And cocaine abuse continuous; is that correct?

A. That's correct.

Appendix J

Q. And as an applicant for employment with Hughes at the stage where the person is reviewed by the medical department, this would be information available to them, the file on the employee?

MR. STOLKIN: Objection; foundation.

THE WITNESS: I would assume so.

BY MR. MARTINEZ:

Q. In fact, isn't that where you keep the information on drug screens, in the medical file?

A. I believe so.

(Exhibit 7 marked for identification.)

BY MR. MARTINEZ:

Q. Let me show you Exhibit 7. So, for example, the drug screen result which is reflected in Exhibit 7 reflects a positive test for cocaine metabolites would also be available in that medical [119] file on Mr. Hernandez, correct?

MR. STOLKIN: Objection; foundation.

THE WITNESS: I can't answer that with specificity; however, it does on the top of the paper say, "Hughes Aircraft Company," so I'm assuming that would be in the medical file.

Appendix J

BY MR. MARTINEZ:

Q. And it also says, "medical department," doesn't it?

A. Oh, it does, that's correct.

Q. Isn't it true, Mr. Medina, that even if Mr. Hernandez doesn't identify himself as a person who has a history of drug abuse or alcohol abuse, that if he gets to the phase in the employment process where he is having the medical evaluation, because of the information in the company's medical file concerning Mr. Hernandez you're going to know about that history?

MR. STOLKIN: Objection; form and foundation.

THE WITNESS: Theoretically we would know. In the practical sense it seems to me he would have had to have said something that may have given rise to the fact he may have had a previous history. The medical department may or may not recognize him or know him.

* * * *

APPENDIX K — DETERMINATION OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PHOENIX DISTRICT OFFICE DATED NOVEMBER 20, 1997

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

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Charge No. 350-94-1479

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Charging Party

Hughes Aircraft (Hughes Missile Systems Company)
Old Nogales Highway
Tucson, AZ 85706

Respondent

DETERMINATION

I issue the following determination on the merits of this charge.

Appendix K

Respondent is an employer within the meaning of Title I of the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §12101, et seq. and timeliness, and all other requirements for coverage have been met.

The Charging Party alleged that on January 27, 1994, he applied for one of seven positions as Product Test Specialist and was not hired because of a disability.

Examination of the evidence reveals Charging Party was previously employed by Respondent for approximately 20 years. He held various positions in which he successfully performed the job functions required of a Product Test Specialist. On July 15, 1991, he resigned in lieu of discharge as a result of testing positive for alcohol and illegal drugs. In January 1994, Respondent had seven openings for Product Test Specialist. On January 27, 1994, Charging Party submitted his resume to Respondent for consideration for one of these positions. The evidence indicates that at the time of his application Charging Party submitted a statement to Respondent indicating he was recovered and no longer an illegal drug or alcohol user. The evidence shows Respondent rejected Charging Party's application based on his record of past alcohol and drug use.

The Americans with Disabilities Act states that an employer may not deny employment to a drug addict or alcoholic who is not currently using drugs or alcohol and has been rehabilitated, because of a history of drug addiction or alcoholism. In this instance, Respondent denied employment to charging Party because of his history of drug and alcohol

Appendix K

abuse. Accordingly, I find reasonable cause to believe that Charging Party was denied hire to the position of Product Test Specialist because of his disability.

Upon finding that there is reason to believe that violations have occurred, the commission attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, the commission now invites the parties to join with it in reaching a just resolution of this matter. The confidentiality provisions of ADA and Commission Regulations apply to information obtained during conciliation.

If the Respondent declines to discuss settlement or when, for any other reason, a settlement acceptable to the office Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. A Commission representative will contact each party in the near future to begin conciliation.

On Behalf of the Commission:

NOV 20 1997
Date

s/ Charles D. Burtner
Charles D. Burtner
District Director

(6)

Supreme Court, U.S.
FILED
MAR 9 2003
OFFICE OF THE CLERK

No. 02-749

IN THE

Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Americans with Disabilities Act confers preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use.

PARTIES TO THE PROCEEDING

Joel Hernandez, the plaintiff in the trial court and the respondent here, formerly was employed by, and later sued, Hughes Missile Systems Company, a subsidiary of Hughes Aircraft Company. (As noted in the Corporate Disclosure Statement, Raytheon Company subsequently purchased Hughes Aircraft Company and its subsidiaries.)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Raytheon Company states that it purchased Hughes Aircraft Company (and, with it, the subsidiary Hughes Missile Systems Company). Raytheon issues shares to the public.

Neither Hughes Electronics Corporation (Hughes Aircraft Company's former parent) nor General Motors Corporation (formerly part owner of Hughes Electronics Corporation) has any financial interest in this litigation.

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OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Ninth Circuit, dated June 11, 2002, is not reported, but it is reproduced at 2002 U.S. App. LEXIS 16163. In response to a petition for rehearing, the panel amended its initial opinion; that amendment is reproduced in the Appendix to the Petition for Certiorari ("Pet. App.") at page 14a and the entire opinion as amended is reported at 298 F.3d 1030 and reproduced at Pet. App. 1a-13a. The order of the district court granting the Company's motion for summary judgment is not reported, but it is reproduced at Pet. App. 16a-17a.

STATEMENT OF JURISDICTION

Jurisdiction existed in the district court under 28 U.S.C. § 1331. The initial panel opinion was issued on June 11, 2002. A timely petition for rehearing and suggestion for rehearing *en banc* was filed. The panel denied rehearing but issued its amended opinion on August 11, 2002. The suggestion for rehearing *en banc* was denied the same day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act ("ADA") is codified at 42 U.S.C. §§ 12101-12213. The relevant provisions of the Act are included in an Appendix to this brief.

STATEMENT OF THE CASE

Overview

The question posed in this case is whether Hughes Missile Systems was obligated to excuse respondent Joel Hernandez from the consequences of his aggravated workplace misconduct because (he now claims) that misconduct was causally related to a disability.

Hernandez was caught at work with cocaine in his system. He suffered the sanction Hughes invariably imposed for such misconduct: He was (a) terminated; and (b) disqualified from future re-employment. The court of appeals held, however, that the ADA requires that such a "no-rehire" rule be waived as to someone, like Hernandez, who claims to have been a drug addict at the time of his termination. Employers, the court held, must make special dispensation for those who attribute their workplace misconduct to a disability.

The ADA requires no such preferential treatment. The Act certainly requires employers to treat the disabled evenhandedly (*i.e.*, without disparate treatment), but Hughes unquestionably did that. The Act also can require preferential treatment (reasonable accommodation) for the disabled in certain, specified circumstances — when preferences are necessary to accommodate "the physical or mental impairments of [an] employee or applicant." 42 U.S.C. § 12112(b)(5)(B). But Hernandez had no such impairment when he applied for rehire, and he thus was entitled to no preference.

Hughes's policy is common in industry. Many employers adopt and uniformly apply a rule against rehiring individuals who previously were discharged (or permitted to resign in lieu of termination) because of aggravated workplace misconduct. A no-rehire rule like the one adopted by Hughes serves many important business interests. These rules preserve the employer's institutional memory, because human recollections fade and the managers involved in the original termination decision may not be there to remind those then in charge of the offense and its seriousness. Even where those managers *do* remain, there will almost inevitably be friction between the fired employee, now returned, and the managers who were responsible for the decision. Moreover, a blanket prohibition serves as a safeguard against questions of unfairness (or even discrimination) that would inevitably arise if the rule permitted exceptions. To avoid these difficult problems, many employers prefer to adopt the sort of flat prohibition at issue in this case.

Hughes's no-rehire rule is straightforward, as was its application in this case. Hernandez was not discharged illegally. He was permitted to resign in lieu of termination because of a serious breach of company policy. When he reapplied, his application was rejected summarily because of Hughes's no-rehire rule. The question presented, then, is whether Hernandez's contention that his previous misconduct may have been related to drug addiction compels Hughes to exempt him from the no-rehire rule. Because Hughes's rule does not discriminate against anyone on the basis of his or her disability, and because there is no basis for imposing on Hughes an exemption from its ordinary rehire rules as a "reasonable accommodation," summary judgment should have been affirmed by the court of appeals. Its judgment should now be reversed.

Statutory Framework

The ADA provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

An individual can qualify as "disabled" within the meaning of this prohibition in three different ways: (a) the individual actually may have a "physical or mental impairment that substantially limits one or more of the major life activities of such individual"; (b) the individual may have "a record of such an impairment"; or (c) the individual may be falsely "regarded as having such an impairment." *Id.* at §§ 12102(2)(A)-(C); *see also Sutton v. United Airlines Inc.*, 527 U.S. 471, 488-89 (1999) (the "regarded as" aspect of the statute is limited to cases in which the employer inaccurately believes that the employee has a substantially limiting physical or mental impairment).

The word "discrimination" in 42 U.S.C. § 12112(a) ordinarily would suggest that the employer's statutory duties are fulfilled if it refrains from disparate treatment. The statute, however, defines "discrimination" also to include the failure to grant preferences ("reasonable accommodations") in certain limited circumstances. Specifically, an employer "discriminates" if it (a) does not "mak[e] reasonable

accommodations *to the known physical or mental limitations of an otherwise qualified individual with a disability* who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity"; or (b) "den[ies] employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation *to the physical or mental impairments of the employee or applicant. . . .*" *Id.* §§ 12112(b)(5)(A)-(B) (emphasis added). Under both subdivisions, the reasonable accommodation obligation extends only to those who actually have "physical or mental impairments" or "limitations."

Finally, the Act provides special rules for the treatment of users of illegal drugs. Individuals currently using illegal drugs are expressly excluded from statutory protection. 42 U.S.C. § 12114(a). The Act also explicitly provides that employers

> may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees; may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace; . . . [and] *may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.*

Id. §§ 12114(c)(1)-(4) (emphasis added).

Factual Background

Hernandez formerly worked on U.S. military programs for Hughes Missile Systems. One day in July 1991, Hernandez came to work with cocaine in his system and alcohol on his breath. J.A. 18a, 33a. Hernandez (as he later would admit in deposition) had been up much of the previous night, drinking alcohol and snorting cocaine. J.A. 34a, 36a. Company supervisors noticed the odor and suspected that Hernandez was impaired. J.A. 34a. Hernandez was given a blood test, which revealed the cocaine use. The Company gave Hernandez a choice: resign or be terminated. Hernandez chose to resign. The parties and the courts below treated his departure as an involuntary discharge. *See* Pet. App. 4a n.4 ("[F]or the purposes here — the rehiring of former employees — there appears to be no difference in Hughes's treatment of employees who were terminated as opposed to those who resigned under threat of termination."); *id.* at 12a n.17 ("There is no question that Hughes applied this policy [against rehiring those who are discharged or quit in lieu of termination] in rejecting Hernandez's application.").

In completing a one-page Employee Separation Summary form on Hernandez at the time of his departure, the Company did not spell out all the facts and circumstances surrounding his separation. It simply noted that Hernandez had been "[d]ischarge[d] for personal conduct (Quit in lieu of discharge)." J.A. 37a-38a.[1]

1. This was not the first time that Hernandez's substance abuse had resulted in discipline at Hughes. In 1986, Hughes was about to terminate Hernandez for excessive absenteeism, but he told the Company that his absences were caused by alcoholism. He was given the opportunity to seek rehabilitation in lieu of termination. Although

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Hernandez then went to work for Marathon Resources, Inc. J.A. 38a. Hernandez lied to get that job, telling Marathon that he had taken "early retirement" from Hughes. J.A. 41a-42a. Hernandez was disciplined by Marathon for substance abuse in 1992. J.A. 43a-46a. (The record does not reveal the nature of the abuse.) Hernandez never sought "treatment of any kind" for drug addiction (J.A. 39a); he asserted that he simply stopped using drugs in 1992. J.A. 44a.

In 1994, Hernandez reapplied to work at Hughes. As part of his application, Hernandez submitted two nine-month-old letters of reference. J.A. 54a. The first, a four-sentence note from Hernandez's pastor, praised Hernandez as a "faithful and active" member of the church. *Id.* at 13a. The second letter, from a social worker, claimed that Hernandez had "frequently" attended Alcoholics Anonymous meetings and asserted that Hernandez had made "steady and consistent progress" in dealing with alcoholism. J.A. 14a. Neither the application nor the reference letters indicated that Hernandez had ever used drugs (much less that he ever was addicted to them), or that he had successfully overcome a drug addiction.

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he completed the prescribed course of treatment, he (unbeknownst to the Company) immediately lapsed into further abuse. After his release from treatment, he admittedly "was doing it again . . . abusing drugs and alcohol." J.A. 32a. Because Hughes did not know this, it permitted Hernandez to return to work. Hernandez's absenteeism problems returned in 1991, and only a few months before he failed the drug test, Hernandez was given a formal reprimand for excessive absenteeism. J.A. 33a.

Hernandez's 1994 application indicated that he previously had worked for Hughes, and for that reason, the application was referred to Joanne Bockmiller in Hughes's Labor Relations Department. Bockmiller pulled Hernandez's personnel file and reviewed the Employee Separation Summary form. J.A. 48a-49a. As noted above, that form revealed only that Hernandez had been "[d]ischarge[d] for personal conduct (Quit in lieu of discharge)." J.A. 48a. Because the Company had (and still has) a uniformly applied "policy against rehiring former employees who were terminated for any violation of its misconduct rules," Pet. App. 11a, Bockmiller summarily rejected Hernandez's application. Bockmiller did not then know *which* Hughes rule of conduct Hernandez had breached to get himself fired, and she did not know that he had ever used drugs. J.A. 54a-55a. She only knew that Hernandez had been terminated for some unspecified form of misconduct and, like any other formerly discharged employee of Hughes, Hernandez was ineligible for rehire. J.A. 56a-57a.

Hernandez's Charge of Discrimination

Hernandez filed an administrative charge with the Equal Employment Opportunity Commission ("EEOC") alleging a violation of the ADA. In its position statement responding to the charge, the Company pointed out that current drug users are not protected by the Act, and that (for all the record showed) he still was using drugs. There was no basis for believing that Hernandez had ever had a drug-related disabling impairment, much less that the decisionmaker — Bockmiller — knew it and denied him a job because of it. The Company's position statement said, in relevant part:

> The ADA prohibits discrimination against a "qualified individual with a disability." The ADA

> specifically exempts from protection individuals currently engaging in the illegal use of drugs . . . . Contrary to Complainant's unfounded allegation, *his non-selection for re-hire is not based on any legitimate disability*. Rather, Complainant's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.
>
> *The Company maintains its right to deny re-employment to employees terminated for violation of Company rules and regulations. Complainant was discharged for violation of Company Rule and Regulation No. 7 [relating to use of illegal drugs]. . . . Complainant's conduct while employed by [Hughes] makes him ineligible for rehire.*

J.A. 19a-20a (emphasis added).

The Lawsuit

Hernandez sued Hughes under the ADA in the United States District Court for the District of Arizona. He did not challenge his 1991 termination; his complaint was aimed solely at his unsuccessful rehire application in 1994. He did not claim to have had a "disability" within the meaning of the ADA at the time of his termination, and he did not claim that, when he reapplied to work at Hughes in 1994, he suffered from any physical or mental condition that might have impaired his ability to perform any major life activity. J.A. 1a-5a.

Instead, Hernandez claimed that, at the time his reapplication was rejected, he had a "record of . . . an impairment," 42 U.S.C. § 12102(2)(B), and that Hughes "regarded [him] as" having such an impairment, *id.* § 12102(2)(C). J.A. 19a n.2; Pet. App. 6a n.8 ("The parties agree that Hernandez's claim of discrimination is limited to either a 'regarded as' or a 'record of' definition of disability."). Hernandez contended that his drug use in 1991 had been causally related to an addiction from which he subsequently had rehabilitated himself. Thus, Hernandez argued, Hughes acted unlawfully when it applied to him its facially neutral rehire-disqualification policy.

The district court granted Hughes's motion for summary judgment. J.A. 5a. The Ninth Circuit reversed. Pet. App. 1a-13a. The court of appeals acknowledged that when Hernandez was terminated in 1991, he was not a "person with a disability" protected by the ADA. This is because in 42 U.S.C. § 12114, Congress had expressly excluded "current" drug users from ADA coverage. Pet. App. 11a. The court held, however, that there were materials in Hughes's files evidencing his 1991 drug use, and that these documents constituted a *record* of an impairment when he reapplied in 1994. Although Hughes simply had imposed on Hernandez the same consequences it always imposes for serious rules violations — consequences imposed on the disabled and nondisabled alike — the court determined that Hughes's facially neutral, nondiscriminatory rule had to give way. The court of appeals recognized that Hughes was entitled to reject summarily an application for employment submitted by an individual previously fired for nearly any form of misconduct. If, however, the prior misconduct was related in some fashion to illegal drugs (or, presumably, some other

disability), the court held that the ADA confers preferential rehire rights, in the form of a second chance:

> Hughes's . . . policy against rehiring former employees who were terminated for any violation of its misconduct rules, although not unlawful on its face, *violates the ADA as applied to former drug addicts whose only work-related offense was testing positive [for drug use but who] ha[ve] been successfully rehabilitated*. . . .

Pet. App. 11a (emphasis added).

This Court granted certiorari. __ U.S. __, 123 S. Ct. 1255 (Feb. 24, 2003).

SUMMARY OF ARGUMENT

Disability discrimination under the ADA can occur in two ways: disparate treatment and failure to provide reasonable accommodation. Neither occurred here.

A. The Company treats identically all employees terminated for violating its personal conduct rules: they all lose their jobs, and they all permanently lose the right to be considered for future employment. Both consequences flow from the misconduct whether or not the terminated employee happens to have a disability. Sexual harassment is treated this way, whether it stems from a personality disorder or poor judgment. The same is true for workplace assaults, whether they stem from mental illness or merely an uncontrolled temper. Drug use falls in the same category: Hughes imposes the same consequences on all employees who arrive at work with cocaine in their systems, whether the use of drugs is

"recreational" or habitual. Hughes has a zero-tolerance drug policy and thus does not "discriminate" in any ordinarily understood sense of that word. Accordingly, Hernandez can make no serious claim of disparate treatment.

B. Hernandez was not entitled to any accommodation when he applied for rehire. He was not suffering at that time from any "physical or mental impairment that substantially limit[ed] [him] in [any] major life activit[y]." 42 U.S.C. § 12102(2)(A). Thus, if Hernandez was covered by the ADA, it could only have been under the "regarded as" or "record of" aspects of the definition of "disability." Although "regarded as" and "record of" plaintiffs are entitled by the statute to equal treatment, they are *not* entitled to reasonable accommodation because they do not have the actual "physical or mental impairment" or "limitation" that is the statutory precondition to such an accommodation.

But even if the ADA required some form of accommodation, the accommodation Hernandez now seeks — a "second chance" — would not be reasonable. The ADA does not prevent employers from enforcing nondiscriminatory standards of conduct or meting out nondiscriminatory discipline. As the EEOC has said, "[a]n employer *never* has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity [and it] may discipline an employee with a disability for engaging in such misconduct *if it would impose the same discipline on an employee without a disability*." EEOC Enforcement Guidance on Reasonable Accommodation, EEOC COMPL. MAN. No. 290, 902:0167 (Q&A No. 35) (2002) (emphasis added). That is what Hughes did here. It imposed on Hernandez "the same discipline" — termination, coupled with ineligibility for rehire — it indisputably would have imposed on an employee without a record of impairment.

Nothing in the ADA requires that a person with a disability get a second chance that others would not get. An employer may be obligated to provide a disabled applicant with a reasonable accommodation when the accommodation is necessary to give the applicant "an *equal* opportunity to participate in the application process and to be considered for a job." EEOC Enforcement Guidance on Reasonable Accommodation, EEOC COMPL. MAN. No. 290, 902:0152 (2002) (emphasis added). Here, however, Hernandez asked to be considered for a job that a similarly situated applicant without a disability never would get.

A rule permitting employers to impose evenhanded discipline would be sensible enough as a general proposition — when applied to disabilities unrelated to substance abuse — but its application in this circumstance stands on even firmer ground. This case involves repeated alcohol and felony drug use by a senior technician working for a U.S. government contractor on missile systems. Congress carefully considered and set precise rules for drug cases, applicable even as to less safety-critical jobs. The ADA excludes current drug users from its protections and expressly permits an employer to

> hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that [it] holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.

42 U.S.C. § 12114(c)(4). The ADA thus does not give drug addicts or drug users (or former drug users) a free pass; it simply expects employers to consider them without discrimination. That is exactly what Hughes did here.

C. The court of appeals erred in holding that the availability of information about Hernandez's drug use somehow imposed on Hughes a duty to create a special exception to its no-rehire policy. Hernandez now asserts that he was a drug addict when he was fired in 1991, but there was no evidence in the record that anyone at Hughes knew of the alleged addiction, either then or when he later reapplied. When he was terminated, Hughes knew simply that Hernandez had cocaine in his system when he came to work that day. The Company was indifferent as to whether his drug abuse was "recreational" or habitual.

It is also undisputed that when Bockmiller rejected Hernandez's 1994 rehire application, she simply verified from a one-page form that his prior employment had ended involuntarily because of unspecified misconduct. Once she knew that Hernandez had earlier been terminated because of misconduct, she rejected the application. As a disparate treatment case, then, Hernandez's claim fails because Bockmiller could not have been motivated by animus against recovering drug addicts or drug users because she did not know that Hernandez was one. As a reasonable accommodation case, Hernandez's claim fails because an employer need only provide "reasonable accommodations to the *known* physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). Under either theory, the decisionmaker's knowledge of Hernandez's disabled status would be a *sine qua non* of the claim.

The court of appeals held, however, that employers have an *affirmative obligation* under the ADA to disseminate such information to potential decisionmakers, and thus that Hughes had a duty to inform Bockmiller about Hernandez's past (Pet. App. 12a). The notion that employers should be

affirmatively required to broadcast information about an employee's medical condition and (putative) disability finds no support in the statute. Such a rule would undermine fundamental policies, including confidentiality, that the ADA was intended to further, and simply is illogical.

ARGUMENT

I. HERNANDEZ WAS SUBJECTED TO A UNIFORM COMPANY RULE, AND THUS THERE WAS NO DISPARATE TREATMENT

"'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion or other protected characteristics." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (brackets and citation omitted); *see also Watson v. Ft. Worth Bank & Trust Co.*, 487 U.S. 977, 985-986 (1988) (a disparate treatment claim exists when "an individual alleges that an employer has treated that particular person less favorably than others because of the [person's protected characteristic]"). When a statute, like the ADA, makes it unlawful for an employer to deny an employee or an applicant job opportunities "because of" the employee's protected status, "the disparate treatment theory is of course available." *Hazen Paper*, 507 U.S. at 609.

There was no disparate treatment in this case. Hernandez was not treated "less favorably than other[]" Hughes employees in similar circumstances. As the court below observed, Hughes applied to Hernandez its "blanket policy against rehire of *all* former employees who violated company policy. . . ." Pet. App. 12a (emphasis in original). With respect to its rules of conduct, Hughes treats all of its employees —

the disabled and the nondisabled alike — in precisely the same fashion. Every employee who engages in aggravated workplace misconduct like Hernandez faces two invariable consequences: (a) he or she is discharged; and (b) he or she never will be considered by the Company for reemployment.

The ADA requires nothing more. "[A]n employer is not required to excuse past misconduct even if it is the result of the individual's disability." Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002), *reprinted in* EEOC COMP. MAN. No. 290, 902:0167 (Q&A No. 36). On matters of discipline, the employer is obligated only to treat the disabled and the non-disabled alike: "An employer never has to excuse a violation of a *uniformly applied* conduct rule that is job-related and consistent with business necessity. . . . An employer may discipline an employee with a disability for engaging in such misconduct *if it would impose the same discipline on an employee without a disability*." *Id.* (Q&A No. 35) (emphasis added).

This principle of nondiscrimination means that an employer is permitted to enforce its disciplinary rules so long as its enforcement is even-handed; an ADA plaintiff does not secure special protection by asserting that "the disability made me do it." A different rule would provide a dangerous safe harbor for conduct that threatens worker and public safety — *e.g.*, drunk driving and public intoxication, drug use at work, the use of other intoxicants at work, possession or use of firearms at work, and other felonious activities.[2]

2. *See, e.g., Pernice v. City of Chicago*, 237 F.3d 783, 785-786 & n.1 (7th Cir. 2001) (the ADA did not prohibit the employer from terminating plaintiff for cocaine possession and disorderly (Cont'd)

Employers have to be able to respond to these threats by discharging offending employees. Of course, if the discharge is permissible, then there is no basis for attacking the correlative ban on rehiring.

The court of appeals dismissed the severity of Hernandez's misconduct, stating that "Hernandez's only work-related offense was testing positive for cocaine." Pet. App. 13a. The court was incorrect in two respects. First, simultaneously working on missiles and using cocaine poses grave risks to public safety that simply are not acceptable. Thus, the court of appeals' suggestion that Hernandez was "only" guilty of a minor offense represents a fundamental misapprehension of the problem. Second, *taking* drugs (although a crime) was not the offense that led to Hernandez's termination; his offense was *reporting to work* with drugs in his system. The drug test and its results were not the violation, but rather were the method of proving the violation.

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conduct notwithstanding claim that a disability caused the drug use); *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 671-672 (7th Cir. 2000) (a doctor was lawfully terminated after patients and others reported that she smelled of alcohol and had glassy eyes), *cert. denied*, 532 U.S. 972 (2001); *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 848 (6th Cir. 1995) (alcoholism may have compelled the plaintiff to drink, but it did not compel him to drive drunk); *Taub v. Frank*, 957 F.2d 8, 9 (1st Cir. 1992) (no Rehabilitation Act violation in terminating an employee for heroin possession, even though the plaintiff said that the possession was inextricably linked to addiction); *Hindman v. GTE Data Servs., Inc.*, 3 A.D. Cas. (BNA) 641 (M.D. Fla. 1994) (plaintiff brought loaded gun to work allegedly because of a "chemical imbalance").

There was no disparate treatment here. Hernandez was terminated, and barred from later rehire, under the same rules applicable to all.

II. BECAUSE HERNANDEZ SUFFERED FROM NO "IMPAIRMENT" WHEN HE REAPPLIED, HE WAS NOT ENTITLED TO A REASONABLE ACCOMMODATION

Under certain circumstances specified in the Act, equal treatment of the disabled may not be enough; preferences, in the form of a reasonable accommodation, sometimes can be required. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 429 (2002). Although the Ninth Circuit here did not use the term "reasonable accommodation," the court held in effect that Hughes discriminated by acting evenhandedly; only through a reasonable accommodation analysis can an employer conceivably become obligated to provide special preferences. Here, the court of appeals declared that special allowances must be made if the plaintiff misbehaves and later claims that "a disability made me do it." But Hernandez was not entitled to preferential treatment in the form of a reasonable accommodation, as shown below.

A. "Regarded As" And "Record Of" ADA Plaintiffs Are Not Entitled To Reasonable Accommodation

Three categories of persons are protected under the ADA: (a) those who suffer from a "physical or mental impairment that substantially limits one or more of the major life activities"; (b) those who have "a record of such an impairment"; and (c) those who are falsely "regarded as" having such an impairment. 42 U.S.C. §§ 12102(2)(A)-(C). Hernandez is not now, and never has been, in the first

category. Even if the Court were to assume, as did the court of appeals, that his drug use once had a substantial impact on some major life activity (and there is no evidence in the record in this case that it did), as someone then "currently engaging in the illegal use of drugs" Hernandez was, in 1991, in a group that Congress expressly excluded from ADA coverage. 42 U.S.C. § 12114(a).

The court of appeals concluded, however, that Hernandez fell within one of the other two categories of disabled individuals — those with a "record of" an impairment or who are "regarded as" disabled. But "regarded as" and "record of" plaintiffs are not entitled to reasonable accommodation. The reasonable accommodation obligation flows from 42 U.S.C. § 12112(b), the statutory definition of the term "discriminate." Under that section of the Act, an employer "discriminates" against a disabled applicant or employee, *inter alia*, if the employer fails to "mak[e] reasonable accommodations *to the known physical or mental limitations* of an [individual who is] otherwise qualified," *id.* § 12112(b)(5)(A) (emphasis added), or "den[ies] employment opportunities to a job applicant or employee [where the] denial is based on the [unwillingness of the employer] to make reasonable accommodation *to the physical or mental impairment* of the employee or applicant," *id.* § 12112(b)(5)(B) (emphasis added). In both instances, the employer's obligation is to accommodate someone who possesses — present tense — "known physical or mental limitations" (subsection A) or "physical or mental impairments" (subsection B).

When Hernandez reapplied to Hughes, he had no "physical or mental limitations" or "impairments" that Hughes might have accommodated. He claims (concedes,

really) that by the time he reapplied, he was "recovered" from his alleged addiction, and that he was fully capable of performing either of the jobs for which he applied. *See, e.g.*, Opp. to Pet. at 3 ("Since early 1992 to the present, Mr. Hernandez 'has been clean and sober and has used no alcohol or drugs'"). He alleges no substantial, ongoing "physical or mental" impairment; he complains only about the alleged stigma persisting from his prior drug use. That stigma, however, is not a "known physical or mental *limitation*" or "physical or mental *impairment*[]" — the prerequisites to imposing the statutory obligation to make a reasonable accommodation. Thus, under the plain language of the statute, "regarded as" and "record of" plaintiffs are not entitled to reasonable accommodation.

Similarly, the EEOC's regulations make clear that Hughes owed no duty to accommodate Hernandez. According to the EEOC, "[t]here are three categories of 'reasonable accommodations'":

> (i) *Modifications or adjustments to a job application process* that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) *Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed*, that enable a qualified individual with a disability to perform the essential functions of that position; or
>
> (iii) *Modifications or adjustments that enable a covered entity's employee with a disability to enjoy*

> *equal benefits and privileges* of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. §§ 1630.2(o)(1)(i-iii) (emphasis added).

None of these categories fits this case. Hernandez did not ask Hughes to modify its "job application process"; he seeks to have Hughes lower its substantive job qualification standards to permit him special access to a job. He did not seek a change "to the work environment" or to the way in which a job "is customarily performed." Nor did he need such a change to enable him "to perform the essential functions of [any] position." Finally, Hernandez did not want "to enjoy equal benefits and privileges of employment as are enjoyed by . . . similarly situated" but non-disabled applicants; he seeks exceptional treatment, in the form of a second chance, that no other applicant would have received.

The reasonable accommodation obligation — essential as it is to the effective operation of the ADA — is not unbounded. Congress understood that reasonable accommodations, though necessary for those with statutory impairments, are strong medicine, to be administered judiciously. Those accommodations might be needed, Congress determined, to open the doors of opportunity for those who currently are experiencing physical or mental limitations. But that rationale does not extend to "regarded as" and "record of" plaintiffs. They are entitled to be free from disparate treatment, but they are not entitled to reasonable accommodation because, by definition, they do not then have a current physical or mental limitation requiring accommodation.

Several courts of appeals have noted the nonsensical results that would follow from accommodating those who suffer from no current impairment. If the Act were so interpreted,

> impaired employees would be better off under the statute if their employers treated them as disabled even if they are not. . . . [This] would do nothing to encourage those employees to educate employers to see their employees' talents clearly; instead it would improvidently provide those employees a windfall if they perpetuated their employer's misperception of a disability.

Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 2002 U.S. App. LEXIS 6221, at *18-*19 (9th Cir. April 1, 2003); *accord Weber v. Strippit, Inc.*, 186 F.3d 907, 916-917 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998); *Deanne v. Pocono Med. Ctr.*, 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc) (dictum); *but cf. Katz v. City Metal Co.*, 87 F.3d 26, 31 (1st Cir. 1996) (discussing, without statutory analysis, accommodating a "regarded as" ADA plaintiff).

In sum, Hernandez's claim fails because "regarded as" and "record of" plaintiffs are not owed reasonable accommodation.

B. A "Second Chance" Is Not A Reasonable Accommodation In Any Event

Even if "regarded as" and "record of" plaintiffs are entitled to accommodations under the statute, the accommodation sought here — a second chance — would not be reasonable. An employer's obligation under the Act is to consider those accommodations necessary to "enable a qualified individual with a disability to enjoy *equal* employment opportunities." EEOC COMPL. MAN. No. 274, 0560:00002 (2001), Order No. 560 (emphasis added). Here, however, Hernandez does not seek "equal employment opportunities," but rather preferential treatment.

Moreover, the statutory obligation to provide a reasonable accommodation is forward-looking. As the EEOC has explained, because a "reasonable accommodation is always prospective, an employer is not required to excuse past misconduct, even if it is the result of the individual's disability." EEOC Compl. Man. (BNA) N:2465, N:2480; EEOC, Psychiatric Disabilities and the ADA ¶ 31, *reprinted in* 8 Fair Empl. Prac. Man. (BNA) 405:7477 (1997) (reasonable accommodation is prospective, and does not require employer to excuse past misconduct even if the misconduct is caused by a disability).

The courts of appeals consistently have rejected the proposition that the duty to accommodate requires employers to offer a "second chance" to those who fail to meet performance or conduct standards. *E.g.*, *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666-67 (7th Cir. 1995) ("Siefken is not asking for an accommodation; . . . [h]e is asking for another chance. . . . But the ADA does not require this."); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 320 (5th Cir.

1997) (the employer need not grant a second chance to a person guilty of alcohol-related misconduct, even though the misconduct may have been attributable to alcoholism), *cert. denied*, 522 U.S. 1084 (1998); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (the plaintiff was discharged for sleeping on the job, which she said was brought on by medication for her disability; the ADA does not require giving the employee a "second chance" to conform to the employer's rules), *cert. denied*, 528 U.S. 1137 (2000); *Burroughs v. City of Springfield*, 163 F.3d 505, 507 (8th Cir. 1998) (plaintiff became dysfunctional due to seizures that resulted from his failure to take his medication; "Burroughs failed to meet th[e] [employer's] legitimate expectation . . . , and the ADA does not require the City to provide him another chance. . . .").

Even if there were doubt about the manner in which these principles are to be applied in *other* cases, *i.e.*, to the vast run of disabilities, there can be no such doubt about Congress's views regarding the use of illegal drugs. Congress took special pains to ensure that the Act conferred no special rights on drug users. Specifically, the Act: (a) defines the term "qualified individual with a disability" to exclude those currently using illegal drugs; (b) authorizes employers to prohibit the use of illegal drugs on the job, and to prohibit employees from arriving at work with drugs in their systems; and (c) permits employers to apply uniform "qualification standards for employment" and uniform standards for "job performance and behavior [to those who engage in the use of illegal drugs] even if [the] unsatisfactory performance or behavior is related to . . . drug use. . . ." 42 U.S.C. §§ 12114(c)(1), (2) & (4). Thus, when an employer takes action against "any employee or applicant" because of behavior "related to . . . drug use," it unquestionably acts lawfully. *Id.* § 12114(a).

When Hernandez was discharged for coming to work with cocaine in his system, Hughes held him "to the same standards [of] . . . behavior that [it uniformly applied] to other employees [even though the specific kind of] behavior [in which he engaged was] related to . . . drug use." 42 U.S.C. § 12114(c)(1). And, when it subsequently rejected Hernandez's application for prior, terminable misbehavior, it merely enforced its no-rehire rule, a "qualification standard[] for employment . . . that [it applies] to other" employees who seek to be rehired,[3] regardless of the nature of the prior misbehavior. *Id.* § 12114(c)(4).

The no-second-chance rule has been uniformly applied (until the Ninth Circuit's decision in this case) in the context of applications for rehire. In *Harris v. Polk County*, 103 F.3d 696 (8th Cir. 1996), for example, the plaintiff alleged that she had a mental illness that proximately caused the shoplifting incident for which she had been terminated. *Id.* When she applied for reemployment, the employer summarily rejected the application because, as a matter of "office policy," it refused to hire individuals known to have been guilty of unlawful conduct. *Id.* Rejecting the plaintiff's argument that the ADA sheltered her from the consequences of her disability-related misconduct, the Eighth Circuit observed that "an employer [must be able to] hold disabled employees to the same standard of law-abiding conduct as all other employees." *Id.* at 697.

3. The court of appeals thought it "interesting" that, at Hughes, incumbent employees who are discharged for drug use are barred forever from rehire, but that applicants who are rejected for testing positive for drugs are barred from reapplication only for 12 months. Pet. App. 11a n.16. There is no mystery. The incumbent Hughes employee who commits a drug violation had notice of, was subject to, and violated a Company conduct rule by choosing to come to work with drugs in his system; the applicant is not similarly situated.

Similarly, in *Johnson v. New York Hospital*, No. 99-7165, 1999 U.S. App. LEXIS 20151 (2d Cir. Aug. 20, 1999), the plaintiff had been terminated from his job for assaulting other employees while he was off duty. The plaintiff attributed his misconduct to a disability. When he reapplied for a job, the employer rejected him, citing its "policy of not rehiring any employee who has been discharged." *Id.* at *2. The Second Circuit rejected the notion that the ADA immunized the plaintiff from the consequences of his misconduct or mandated special exceptions for conduct merely because it may have a nexus to a disability.

In *Flynn v. Raytheon Co.*, No. 96-1019, 1996 U.S. App. LEXIS 20837 (1st Cir. Aug. 9, 1996) (unpublished opinion), *aff'g* 868 F. Supp. 383 (D. Mass. 1994), the plaintiff was fired for reporting to work under the influence of alcohol. The plaintiff did not dispute that the discharge was lawful; rather, he sued over Raytheon's decision not to consider him for reinstatement or rehire. In stark contrast to the decision below, the First Circuit affirmed summary judgment, noting that

> [t]he ADA does not require an employer to rehire a former employee who was lawfully discharged for repeated disability-related failures to meet its legitimate job requirements, *viz.*, punctuality and sobriety. . . . Flynn cites no authority for his claim that the ADA entitles him to a "second chance" to meet Raytheon's legitimate work requirements. . . .

Id. at *4-*5.

All of these cases were correctly decided, and their holdings are supported by compelling practical considerations (along with the Act's statutory text).[4] Countless U.S. employers now have policies, formal or informal, barring the reemployment of those earlier terminated for misconduct. These rules preserve an employer's institutional memory. The managers involved in a termination decision may be gone when the fired employee reapplies. A no-rehire rule keeps new managers — who know little or nothing about the original offense — from repeating the company's earlier hiring mistakes. Moreover, the relationship between a former employee and the employer that previously fired him (and the managers who were involved in the decision) will often, if not inevitably, be freighted with substantial baggage; a no-rehire rule eliminates those sorts of unnecessary complications from the workplace. Thus, when such an individual reapplies, and the employer sees "not eligible for rehire" (or equivalent language) on a personnel form, that legitimately should be the end of the matter. Nothing in the text of the ADA or in the policies that have informed this Court's ADA decisions requires that an employer do more.

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4. In fact, the panel opinion in this case departs from prior (though unpublished) Ninth Circuit precedent. In *Caniano v. Johnson Controls Inc.*, No. 98-35159, 1999 U.S. App. LEXIS 20648 (9th Cir. Aug. 26, 1999), the plaintiff was terminated following a long string of absences. After the termination, he attributed his absences to a disability (dysthemia), and asked to be reinstated or rehired. The Ninth Circuit declined to read the ADA to require an employer "to rehire a legitimately terminated employee upon the employee's demonstration that he [now] could perform the job" satisfactorily. *Id.* at *4.

C. Because The Decisionmaker Knew Nothing Of Hernandez's Alleged Disability, She Could Not Have Violated The ADA By Rejecting His Application

The court of appeals clearly erred in holding that Hughes either discriminated against, or was obligated to accommodate, Hernandez. What makes the Ninth Circuit's reasoning in this case particularly curious is its attempt to take facts which clearly demonstrate that no discrimination occurred and twist them in a way that the court at least believed could create a basis for liability.

First, if anyone erroneously "regarded [Hernandez] as" a person with a disability, it was the Ninth Circuit itself, which assumed that all drug use is inevitably tied to an addiction and that drug addictions are inevitably ADA-qualifying disabilities. This reasoning violates the rule in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).[5] *Williams* teaches that whether someone has a statutory disability turns, not on labels, but on a detailed, person-specific analysis of whether an individual is substantially limited in a major life activity. *Id.* at 196-199. The Ninth Circuit here ignored the lesson of *Williams*.

5. "Recreational" drug *use* is not a covered disability, and a record of having used drugs does not necessarily reflect an addiction. Here, for example, Hernandez testified that he was able to stop using cocaine on his own, without treatment. J.A. 43a-46a. Nothing in Hughes's records revealed an addiction. When Hernandez was released from the alcohol treatment center in 1986, the center reported his *alcohol dependence*, but there was no diagnosis of *drug addiction*; the center simply noted that he was a "cocaine user/abuser." J.A. 30a. That letter was stamped "Company Private" and kept in a medical folder or special counseling file, not Hernandez's personnel file. J.A. 88a-89a. Bockmiller never saw it. J.A. 55a.

The court assumed that all addicts are "substantially limited in one or more major life activities," and thus that a record of an addiction is, necessarily, a record of a statutory impairment. The court undertook no analysis of whether *Hernandez's* drug use *ever* amounted to an addiction or impaired his ability to engage in any major life activity.

The court of appeals evidently believed that this analysis was unnecessary because of its holding that the Company "regarded [Hernandez] as" having a disability. Pet. App. 6a n.8. But the court made two analytical errors. First, Hughes did not "regard [Hernandez] as" anything other than what he was: a person ineligible for rehire because of a record of misconduct. Second, even if it were true that the Company "regarded [Hernandez] as" a former *drug addict*, that would not end the inquiry. The court of appeals made no determination that Hughes regarded Hernandez as having been limited in one or more major life activities on account of that addiction. *Sutton*, 527 U.S. at 476, 478 (the "regarded as" aspect of the ADA is limited to claims that the employer wrongly regarded plaintiff as suffering from a substantial limitation in one or more specified life activities); *see also Burch*, 119 F.3d at 315-16 & 318 n.16 (plaintiff's status as an alcoholic is not sufficient to warrant a finding of disability, which requires an individualized inquiry into the impact on the plaintiff's major life functions); 29 C.F.R. App. § 1630.2(k) (a "record of an impairment" violation exists only if "the record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities.")

In addition, it is undisputed that the decisionmaker (Bockmiller) did not know that Hernandez was "disabled" within the meaning of the ADA. Proof of decisionmaker

knowledge is the first essential step in showing disparate treatment — *i.e.*, that "the protected trait . . . actually motivated the employer's decision." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (internal quotation marks and citation omitted). Obviously, if Bockmiller was unaware of Hernandez's allegedly protected status when she rejected his application, she could not have taken that status into account. Similarly, "[e]mployers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability *that [are] known to the employer.*" 29 C.F.R. App. § 1630.9 (emphasis added); *see also* 42 U.S.C. § 12112(b)(5)(A) (any limitation must be "known").

Bockmiller knew nothing of Hernandez's checkered past — his alleged "record of" an impairment — and she did not "regard" him as disabled. She testified that she only knew what the Employee Separation Form told her: that Hernandez had been terminated for a violation of Hughes's rules of personal conduct. This testimony was unrebutted. Because Bockmiller did not know about Hernandez's alleged "record of" a disability, she could not have engaged in disparate treatment or unlawfully denied him an accommodation.[6]

6. Hernandez and the court of appeals both pointed to the Company's EEOC position statement, quoted *supra* at 8-9, as evidence that "the Company" knew about and relied upon Hernandez's drug use when it rejected his application. It is obvious, however, that the position statement, was merely pointing out the lack of evidence that Hernandez had ever suffered from a disabling impairment, much less that he had, in fact, been rehabilitated. *See* 29 C.F.R. §§ 1630.3(b)(1) & (2) (providing for ADA coverage of individuals, *inter alia*, who have completed or are undergoing a course of supervised drug rehabilitation). Hernandez also claims that the last sentence of the first paragraph quoted from Hughes's letter to the EEOC calls into question the existence of an absolute

(Cont'd)

Instead of concluding that this evidence put an end to Hernandez's claim, the court of appeals determined that because Bockmiller had *access* to more complete information about Hernandez's misconduct — she could have investigated further — a jury might conclude that Bockmiller was lying when she said she knew of no such information. This Court, however, has previously held that a plaintiff may not avoid summary judgment "by merely asserting that the jury might . . . disbelieve the defendant's" testimony. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

In the alternative, the court of appeals held that Hughes had an obligation to broadcast information about Hernandez widely enough to ensure that no one could have made a decision about him ignorant of his past. The court declared that the decisionmaker's ignorance of the facts underlying

(Cont'd)

no-rehire rule at Hughes. But the last sentence of the second quoted paragraph puts that contention to rest: "Complainant's conduct while employed by [Hughes] makes him ineligible for rehire." J.A. 20a. More importantly, whatever others at "the Company" might have known at some point in time, *Bockmiller* was the individual who rejected Hernandez's application, and it is undisputed that she had no role whatsoever in the preparation or review of the position statement. J.A. 64a. The position statement was written by a temporary, contract employee who was uninvolved in the decision to reject Hernandez's application. J.A. 68a. Thus, Bockmiller's testimony — that she did not know anything about Hernandez's alleged drug use at the time she rejected the application, but only that he had previously been terminated for misconduct by Hughes — was and is undisputed. There is no evidence in the record that Bockmiller would have reached a different decision if she had seen proof of rehabilitation; to the contrary, she applied Hughes's no-rehire rule without regard to (and without knowing anything about) the facts that led to Hernandez's original discharge.

Hernandez's termination itself constituted a violation of the ADA:

> If Bockmiller in fact did not know the reasons for Hernandez's "termination," *her lack of knowledge would have been due solely to Hughes's unlawful policy which shields its employees from the knowledge that an employment decision may be illegal.* Maintaining a blanket policy against rehire of *all* former employees who violated company policy . . . may well result, as Hughes contends it did here, in the staff member who makes the employment decision remaining unaware of the "disability" and thus of the fact that she is committing an unlawful act. *Having willfully induced ignorance on the part of its employees who make hiring decisions, an employer may not avoid responsibility for its violation of the ADA by seeking to rely on that lack of knowledge.*

Pet. App. 12a (first and third emphasis added).

This is a preposterous suggestion. Until now, no court has ever suggested that an employer should (let alone must) inform decisionmakers about an employee's (or former employee's) sensitive personal information — and thereby supply the decisionmaker with knowledge that could be used to discriminate.

The Ninth Circuit's analysis cannot be squared with the statute. First, the ADA places on the employee, not the employer, the obligation to identify a disability and ask for help. 29 C.F.R. App. § 1630.9 ("Employers are obligated to

make reasonable accommodation only to the physical or mental limitations resulting from the disability . . . that is [sic] known to the employer. . . . In general . . . *it is the responsibility of the individual with a disability to inform the employer* that an accommodation is needed.") (emphasis added); *see also Wallin v. Minn. Dep't of Corr.*, 153 F.3d 681, 689 (8th Cir. 1998) (same), *cert. denied*, 526 U.S. 1004 (1999); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir.) (same), *cert. denied*, 519 U.S. 1029 (1996); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996) (same). The court of appeals' decision effectively shifts that burden to the *employer*; under the Ninth Circuit's approach, the employee may remain mum about his past and force the employer to ferret out the existence of a disability (or here, a "record of" a disability).

Second, the ADA elsewhere teaches that employers generally should *limit* access to information about the disabilities of employees to the greatest degree possible. *See, e.g.*, 42 U.S.C. § 12112(d)(3) (obligating employers to segregate, in a separate file, "information obtained regarding the medical condition" of an applicant, and severely limit the access of management employees to the information in those medical files). There is no basis in the text of the Act (or in the regulations and cases that interpret it) for imposing on employers any kind of dissemination requirement. Such a requirement would undermine the confidentiality that employees have a right to expect — a right the ADA was intended to foster.

* * * *

The Ninth Circuit decision is an invitation to every employee terminated for misconduct to make the "my disability made me do it" claim. Terminated for absenteeism? *It was caused by alcoholism*. Terminated for incompetence? *I couldn't concentrate because of my drug use*. Terminated for fighting? *It was my bipolar disorder*. Extending preferences for rehire in such a context would have profound consequences for American employers. No longer would companies be able to protect themselves with commonplace, common-sense and non-discriminatory no-rehire rules. Those rules violate neither the text nor the policies of the ADA, and the court of appeals erred in holding otherwise.

CONCLUSION

The judgment of the court of appeals should be reversed.

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APPENDIX — STATUTORY PROVISIONS INVOLVED

§ 12102. Definitions

As used in this chapter:

* * *

(2) Disability

The term "disability" means, with respect to an individual —

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * * *

§ 12111. Definitions

As used in this subchapter:

* * *

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which

is unlawful under the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

* * * *

§ 12112. Discrimination

(b) Construction. — As used in subsection (a), the term "discrimination" includes —

* * *

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant[.]

* * * *

§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who —

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of

drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity —

(1) may prohibit the illegal use of drugs and use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee . . . .

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

* * * *

(10)

Supreme Court, U.S.
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No. 02-749

IN THE

Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does an employer's decision to exclude the job application of a former employee with a record of drug and alcohol addiction from the applicant pool for a job opening for which the former employee was otherwise qualified violate the Americans with Disabilities Act?

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STATEMENT OF THE CASE

Overview and Summary of Argument

Joel Hernandez struggled with alcoholism and drug addition for years before he voluntarily resigned from his position as a Calibration Service Technician at Hughes Missile Systems in Tucson, Arizona on July 15, 1991. The circumstances giving rise to Mr. Hernandez's resignation from Hughes were simple. After almost 25 years of employment with the company, Mr. Hernandez came to work smelling of alcohol on July 11, 1991, and his supervisor ordered him to undergo a drug test. When the test came back positive for cocaine, recognizing the gravity of his long-standing problem with substance abuse, Mr. Hernandez decided to quit Hughes in lieu of almost certain termination.

For almost a year after Mr. Hernandez quit Hughes, he continued to struggle with his addiction to drugs and alcohol without great success.

Finally, on Independence Day of 1992, Mr. Hernandez "hit rock bottom." Now fifty-two years old, Mr. Hernandez reflected on his past and the grim reality that drugs and alcohol had already destroyed much of his life and were threatening to destroy whatever remained of it. On that day, Mr. Hernandez promised himself to forswear drugs and alcohol.

With this promise, Mr. Hernandez also pledged to return to the "church of his childhood," the Latin Free Methodist Church in Tucson, Arizona. Mr. Hernandez became an active participant in the Church in August 1992, and he was baptized as a "faithful and active member" of the Church on October 11, 1992.

At the same time, Mr. Hernandez also began participating regularly in Alcoholics Anonymous. Mr. Hernandez attended A.A. meetings everyday from August through November 1992, and tapered off to attending one to two meetings a week into 1995.

With the support of his Church and A.A., Mr. Hernandez has been free from drugs and alcohol since July 4, 1992 to the present.

On January 27, 1994, about two-and-one-half-years after he quit Hughes in July 1991, Mr. Hernandez applied for one of seven openings for the position of "Products Tests Specialist" with his former employer, Hughes Missile Systems (now Raytheon). Mr. Hernandez had successfully performed in this position at Hughes during his previous tenure with the company, and he felt more than qualified for the job.

Mr. Hernandez attached two letters of recommendation to his job application, the first from his Pastor at Latin Free Methodist, Hector Siquieros, and the second from a sponsor at Alcoholics Anonymous, John Lyman. The letters respectively attested to Mr. Hernandez's regular church attendance and his ongoing recovery from alcoholism.

Instead of allowing Mr. Hernandez the simple dignity of *competing* against the other applicants for one of the open positions, Hughes *excluded* him from the applicant pool at the very threshold of the hiring process. Hughes thus denied Mr. Hernandez the opportunity to compete—and to succeed or fail thereby—based on his abilities *vis a vis* the abilities of the other applicants.

Contrary to Hughes' present contentions, Mr. Hernandez did not ask Hughes to "confer" any "preferential rehire rights" upon him. *See Brief for Petitioner*, i. Instead, he merely asked for the simple (but fundamentally American) right to compete for a job.

Believing that Hughes' refusal to allow him to compete for a job because of his history of addiction to drugs and alcohol violated his civil rights, Mr. Hernandez filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). In response to Mr. Hernandez's Charge of Discrimination, Hughes straightforwardly admitted that "*Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.*" However, once the case proceeded to litigation, Hughes changed its story and asserted that it was somehow "unaware" that Mr. Hernandez ever suffered from drug and/or alcohol addiction and that it excluded his application from the applicant pool based upon an alleged "unwritten, but uniform" policy of prohibiting employees terminated for violating company rules from ever being rehired by the company. *See Brief for Petitioner*, p. 28.

The Americans with Disabilities Act (the "Act") expressly protects recovering alcoholics and drug addicts from discrimination based upon their history of drug and alcohol addiction. *See* 42 U.S.C § 12114(b)(1) (an individual who "has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use" is entitled to protection under the Act). *See also Bragdon v. Abbott*, 524 U.S. 624, 633 (1998) (recognizing that "drug addiction and alcoholism"

can constitute "disabilities" protected under the Act), *EEOC Technical Assistance Manual*, VIII § 8.5 ("Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addition or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past addiction"), H.R. Rep. No. 101-485 (II) at 51 (1990) ("drug addiction and alcoholism" can constitute "physical or mental impairments" protected under the Act), 135 Cong. Rec. S10774-75 (1989) (Senator Kennedy) ("persons who are subjected to discriminatory actions because of a history of illegal drug use which they have successfully overcome are fully protected by the ADA").

The Act also expressly proscribes "exclusionary qualification standards" that act to prevent disabled individuals from "fully participating" in the workforce, like the unwritten rule that Hughes claims it used to exclude Mr. Hernandez's job application from the applicant pool. *See* 42 U.S.C. § 12112(b)(6).

Because Hughes barred Mr. Hernandez from competing for a job based on his history of addiction to drugs and alcohol, as the Court of Appeals correctly concluded in the proceedings below, Hughes' decision to exclude Mr. Hernandez's job application from the applicant pool violated his rights under the Americans with Disabilities Act.

Statutory Framework

Congress enacted the Americans with Disabilities Act on July 26, 1990. Reflecting the broad bipartisan support for the Act, President George H. W. Bush signed it into law on the same day.

Congress enacted the ADA "to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities," including the removal of "exclusionary qualification standards" that prevent qualified disabled individuals from "fully participating" in the workforce and undermine their efforts to achieve "economic self-sufficiency." 42 U.S.C. § 12101(a)(8)&(9).

Title I of the Act governs private employers (like Hughes) and became effective on July 26, 1992, two years after Congress passed the Act. *See* 42 U.S.C. § 12111 note.

The scope of Title I is undeniably broad. It prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

The Act expressly prohibits employers from "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability. . . ." 42 U.S.C. § 12112(b)(6).

The Act protects persons who are currently "disabled" (*i.e.*, those who have a "physical or mental impairment that substantially limits one or more of the[ir] major life activities"), as well as those who have "a record of such an impairment," or who are "regarded as having . . . such an impairment." 42 U.S.C. § 12102(2). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment positions that such individual holds or desires." 42 U.S.C. § 12111(8).

The ADA expressly recognizes that alcoholism and drug addiction can constitute "disabilities" subject to protection under the Act. However, the Act creates a protective divide between disabled alcoholics and drug addicts who are *still engaging* in the use of alcohol and/or illegal drugs, and *recovering* alcoholics and drug addicts no longer disabled by the current use of drugs and/or alcohol.

Specifically, under Section 12114(a) of the Act, an employee or job applicant "*currently* engaging in the use of illegal drugs [or alcohol]" is *not* entitled to protection under the Act, even if the employee or job applicant would otherwise qualify as "disabled" under the Act as a result of such use, and the employer "acts on the basis of such use." 42 U.S.C. § 12114(a) (emphasis added).

Correspondingly, in keeping with the underlying principle that disabled alcoholics and drug addicts *currently* engaging in the use of alcohol and/or illegal drugs are *not* subject to protection under the Act, Section 12114(c) of the Act expressly provides that employers:

1. may prohibit the illegal use of drugs and the use of alcohol in the workplace;

2. may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs in the workplace;

3. may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

4. may test employees or applicants for illegal drugs and "make" employment decisions "based on such test results."

In contrast to its treatment of disabled drug addicts and alcoholics currently using drugs or alcohol, the Act "provides limited protection from discrimination for recovering drug addicts and for alcoholics." EEOC, *Technical Assistance Manual for the Americans with Disabilities Act*, VIII § 8.1. As the EEOC has recognized:

> Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addition or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past addiction.

Id. at VIII § 8.5. Specifically, under Section 12114(b) of the Act,

> *(b) Rules of construction*
>
> Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—
>
> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use.

42 U.S.C.A. § 12114(b).

The Act's express protection of recovering alcoholics and drug addicts is well-reflected in the legislative history of the Act. In the congressional debates proceeding the passage of the Act, Senator Edward Kennedy (Dem.) of Massachusetts stated that:

> Retaining these protections for persons who formerly used or were addicted to illegal drugs, but who have successfully been rehabilitated and no longer use illegal drugs, is an absolutely essential component of our national war against drugs. It also helps to carry out our national commitment to encourage all those who need it to come forward for treatment, and *to ensure that individuals who have successfully overcome drug problems will not face senseless or irrational barriers that work to impede their full reintegration into society.*

135 Cong. Rec. S10775 (emphasis added). Similarly, Senator Jesse Helms (Rep.) of North Carolina remarked that:

> Mr. President, let me finally address the issue of compassion for those who have fallen into the narcotic and alcohol trap. *Anyone who wants to help himself break the cycle of drug addiction*

> *should be given that chance. We should not hinder those who legitimately want to make their life better*, let me also emphasize that I have incorporated the same language for the Rehabilitation Act that Senators HARKIN and KENNEDY agreed to put in Title I of the Americans with Disabilities Act. That means current—and that is a very important word—current abusers of illegal drugs do not qualify as handicapped for the purposes of Federal programs.

Id. S10775 (emphasis added). Senator Tom Harkin (Dem.) of Indiana observed that:

> At the same time, the ADA retains employment protections for applicants and employees who have overcome drug or alcohol problems, including those who are participating successfully in treatment programs and are refraining from illegal drug use or alcohol abuse.

135 Cong. Rec. S10777. Senator Dan Coats (Rep.) of Illinois explained that:

> [S]ection 104 of Title I is intended to make clear that an individual job applicant or employee who currently uses alcohol or illegal drugs is not protected by the ADA's nondiscrimination provisions. At the same time, and consistent with the Rehabilitation Act of 1973, *it is intended that rehabilitated alcoholics and drug users will be protected under this law.*

135 Cong. Rec. S10792 (emphasis added). Senator Patrick Moynihan (Dem.) of New York stated that:

> *I believe it hugely valuable that we extend, as this legislation does, protections from discrimination for those who are rehabilitated or recovering from drug or alcohol addiction.* To turn away from individuals who have recognized their addiction to drugs and alcohol and who have sought, successfully, treatment would indeed be a cruel hoax. I salute these efforts.

135 Cong. Rec. S10801 (emphasis added). Finally, Representative Charles Rangel (Dem.) of New York stated that:

> Treatment can save the lives of individual abusers, and it can also return them to productive roles in society which strengthens our families, our communities, our economy, and our ability to meet the competitive challenges of the growing international marketplace. By providing protections against discrimination for recovered substance abusers and those in treatment or recovery who are no longer engaged in illegal drug use, the bill provides an incentive for treatment. *Under this bill, no one who seeks treatment and overcomes a drug abuse problem need fear discrimination because of past drug use.*

136 Cong. Rec. H2443-H2444 (emphasis added). The Act's express protection of recovering alcoholics and drug addicts is consistent with other federal civil rights laws protecting the disabled, for example, the Fair Housing Act, 42 U.S.C. § 3602(h), and the Rehabilitation Act, 29 U.S.C. § 705(20).

As demonstrated below, Hughes' proposed interpretation of the Act ignores its stated purpose, its express scope, and its legislative history. If adopted by this Court, Hughes's present contentions regarding the scope of the ADA would virtually negate the protections Congress intended to provide to recovering alcoholics and drug addicts under the Act.

Factual Background

Joel Hernandez was only twenty-six years old when he started working as a janitor for Hughes Missile Systems in Tucson, Arizona on July 21, 1966. Joint Appendix ("J.A.") at 12a. Almost twenty-five years later when Mr. Hernandez voluntarily resigned from Hughes on July 15, 1991, he had been promoted to the position of a Calibration Service Technician and was fifty-one years old.

When Mr. Hernandez resigned from Hughes in July of 1991, Hughes evaluated his work ability as "good," his work conduct as "fair," and his work productivity as "fair." In fact, Mr. Hernandez's lengthy tenure of employment with Hughes was unblemished by any significant disciplinary or performance issues, except for two problems relating to absenteeism caused by his addiction to drugs and alcohol in 1986 and 1991. J.A. at 17a.

Specifically, in August of 1986, Hughes was contemplating disciplining Mr. Hernandez for absenteeism. *Id.* When Mr. Hernandez informed Hughes that he was suffering from alcoholism, Hughes offered him the option of entering an alcoholic treatment program or being terminated. *Id.* Mr. Hernandez wisely elected to undergo treatment for his addiction. *Id.*

Mr. Hernandez subsequently admitted himself to a residential alcohol treatment center (Cottonwood de Tucson) in Tucson, Arizona on August 11, 1986. *Id.* Once in treatment, it was also determined that Mr. Hernandez was "alcohol dependent," "cannabis dependent" and a "cocaine abuser" and that his abuse of these substances was "continuous." *Id.* at 30a. After completing thirty days of intensive in-patient therapy at the center, Mr. Hernandez went back to work for Hughes. *Id.* at 17a.

About five years later, Mr. Hernandez's addiction to alcohol and drugs resurfaced. *Id.* at 18a. On July 11, 1991, Mr. Hernandez's supervisor suspected that he smelled alcohol on Mr. Hernandez's breath and instructed him to undergo a drug test. *Id.* After the drug test returned positive for cocaine, facing almost certain termination, Mr. Hernandez voluntarily resigned from his employment with Hughes on July 15, 1991. *Id.*

Mr. Hernandez's *only* "misconduct" on the job immediately prior to his resignation was testing positive for cocaine. Hughes did not discipline Mr. Hernandez for using drugs or alcohol at work or for being under the influence of drugs or alcohol at work. Nor had Mr. Hernandez engaged in any other misfeasance or nonfeasance in the workplace relating to his resignation. Mr. Hernandez's misconduct was based exclusively on his status, *i.e.*, he tested positive for trace amounts of cocaine in his urine.

Almost a year after Mr. Hernandez quit Hughes, on Independence Day of 1992, Mr. Hernandez "hit rock bottom." J.A. at 44a-45b. Having turned 52 years old in April, Mr. Hernandez reflected on his past and recognized that drugs and alcohol had destroyed what should have been the best years of his life. *Id.* Based on this realization, Mr. Hernandez promised himself to renounce drugs and alcohol forever. *Id.*

With this transformation, Mr. Hernandez also promised himself to return to the "church of his childhood," the Latin Free Methodist Church in Tucson, Arizona. *Id.* Mr. Hernandez began regularly attending Church in August 1992, and he was baptized as a "faithful and active" member of the Church on October 11, 1992. *Id.* at 13a.

During the same time period, Mr. Hernandez also became a "good and active" participant in the recovery program of Alcoholics Anonymous. J.A. at 14a.

From July 4, 1992 to the present, Mr. Hernandez "has been clean and sober and has used no alcohol or drugs or otherwise engaged in any conduct constituting substance abuse." *Id.* at 44a-45a.

With his faith renewed and his sobriety intact, on January 27, 1994, Mr. Hernandez applied for the position of Product Test Specialist with Hughes. Mr. Hernandez had successfully performed this position at Hughes in the past, and there were seven openings for the job. J.A. at 18a.

Mr. Hernandez attached two letters of recommendation to his job application that attested to his newfound faith and his ongoing recovery from addiction.

The first letter was written by Hector Siquieros, Mr. Hernandez's Pastor at the Latin Free Methodist Church in Tucson. In a letter dated April 2, 1993, Pastor Siquieros wrote that:

> Dear Personnel Management:
>
> With this letter I, Hector Siquieros, pastor of the Latin Free Methodist Church, would like to recommend Mr. Joel Hernandez to your facilities.
>
> Mr. Hernandez has assisted our church since August of 1992 and was baptized on October 11, 1992. He has been a faithful and active member of the church [and has established] good rapport with the other members.
>
> If you have any questions regarding Mr. Hernandez, do not hesitate to contact me at your earliest convenience.
>
> Very truly yours,
>
> Hector Siquieros
> Pastor

J.A. at 13a.

Mr. Hernandez's job application to Hughes also contained a letter written on his behalf by Mr. John L. Lyman, M.S. Mr. Lyman had worked with recovering alcoholics for many years, and he worked with Mr. Hernandez at Alcoholics Anonymous.

In his April 26, 1993 letter, Mr. Lyman wrote that:

> I have known Mr. Hernandez for almost a year. I have seen him occasionally at his place of employment and frequently at meetings of Alcoholics Anonymous.
>
> I have worked with recovering alcoholics for ten years and have screened people for the New Hampshire Department of Motor Vehicles and referrals from state and federal parol boards, among my other duties.
>
> I volunteered to write you on behalf of Joel Hernandez as I have seen steady and consistent progress in his recovery from this disease.
>
> Joel attends A.A. regularly, participates in discussion when appropriate, is maintaining his sobriety, and is in all a good and active member.
>
> Alcoholics Anonymous has clearly been demonstrated as the best recovery tool for alcoholics and Joel's commitment to the program demonstrates to me his willingness to accept responsibility for his recovery.

> In summary, I would heartily recommend Joel Hernandez for any position for which he is qualified. He is a diligent and caring individual who seems to merit a second chance. You may, if you wish, contact me at home for further information since I am not currently in formal practice due to health problems.
>
> Sincerely,
>
> John L. Lyman, M.S.

J.A. at 14a-15a.

Mr. Hernandez's application packet thus provided Hughes with notice that although he suffered from the "disease" of alcoholism, he was "maintaining his sobriety" and was "actively" participating in Alcoholics Anonymous.

A labor relations representative at Hughes, Ms. Joanne Bockmiller, subsequently pulled Mr. Hernandez's personnel file and reviewed his application package. Although Mr. Hernandez clearly disclosed that he was a recovering alcoholic in his application materials, Hughes did *not* inquire as to the history and status of Mr. Hernandez's recovery. Hughes also elected not to request that Mr. Hernandez undergo a drug or alcohol screen. Hughes also did *not* allow Mr. Hernandez to take any qualifications tests related to the position for which he applied, even though Mr. Hernandez had already passed these tests during his previous tenure of employment with Hughes.

Instead, Hughes pulled Mr. Hernandez's application from the applicant pool and refused to allow him to compete for any of the seven job openings. J.A. at 18a.

Mr. Hernandez's Charge of Discrimination

After Hughes refused to allow Mr. Hernandez to compete for one of the seven openings, Mr. Hernandez filed a Charge of Discrimination against Hughes with the EEOC in June 1994. J.A. at 16a.

In its response to Mr. Hernandez's Charge of Discrimination, on July 15, 1994, in a letter signed by George Medina, the Diversity Development Manager at Hughes, Hughes informed the EEOC that "*Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.*" J.A. at 19a. Thus, in its first attempt to justify its refusal to even consider Mr. Hernandez's job application, Hughes admitted that it excluded Mr. Hernandez's job application from the applicant pool because of his record of previous "drug use" and an alleged lack of evidence demonstrating his "successful drug rehabilitation."

Based on these facts, in November of 1997, the EEOC issued a "Letter of Determination" finding reasonable cause to conclude that Hughes violated Mr. Hernandez's rights under the Americans with Disabilities Act.[1] J.A. at 93a-95a. The EEOC's Letter of Determination found that:

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1. In one of its most recent opinions considering Title VII of the Civil Rights Act, this Court noted the EEOC issues Letters of Determination finding "reasonable cause" of discrimination in only approximately 11% of all charges of discrimination filed with the EEOC. *See Equal Employment Opportunity Commission v. Waffle House, Inc.*, 122 S. Ct. 754, 762 n.7 (2002). Hughes did *not* object to the introduction of the EEOC's Letter of Determination in favor

(Cont'd)

> Examination of the evidence reveals [that Mr. Hernandez] was previously employed by [Hughes] for approximately 20 years. He held various positions in which he successfully performed the job functions required of a Product Test Specialist. On July 15, 1991, he resigned in lieu of discharge as a result of testing positive for alcohol and illegal drugs. In January 1994, [Hughes] had seven openings for Product Test Specialist. On January 27, 1994, [Mr. Hernandez] submitted his resume to [Hughes] for consideration for one of these positions. The evidence indicates that at the time of his application [Mr. Hernandez] submitted a statement to [Hughes] indicating he was recovered and no longer an illegal drug or alcohol user. The evidence shows [that Hughes] rejected [Mr. Hernandez's] application based on his record of past alcohol and drug use.
>
> The Americans with Disabilities Act states that an employer may not deny employment to a drug addict or alcoholic who is not currently using drugs or alcohol and has been rehabilitated, because of a history of drug addiction or alcoholism. In this instance, [Hughes] denied employment to [Mr. Hernandez] because of his history of drug and alcohol abuse. Accordingly, I find reasonable cause

(Cont'd)
of Mr. Hernandez in the proceedings before the District Court or the Court of Appeals. *See generally, Coleman v. Quaker Oats Company*, 232 F.3d 1271, 1283 (9th Cir. 2000) (O'Scannlain, J.) ("An EEOC letter [of determination] is a 'highly probative evaluation of an individual's discrimination complaint.' *Plummer v. Western Int'l Hotels Co., Inc.*, 656 F.2d 502, 505 (9th Cir. 1981). As required by our case law, the district court properly admitted the letter into evidence.").

> to believe that [Mr. Hernandez] was denied hire to the position of Product Test Specialist because of his disability.

After the EEOC's attempts to resolve this dispute by means of conciliation failed, Mr. Hernandez filed a civil action against Hughes in the United States District Court for the District of Arizona in Tucson, Arizona.

The Proceedings Before the Lower Courts

In response to Mr. Hernandez's lawsuit, after completing pretrial discovery, Hughes moved the district court for summary judgment. In its motion for summary judgment, Hughes claimed for the first time that it had rejected Mr. Hernandez's application based on an "unwritten," oral custom of prohibiting employees terminated for violating company rules from ever working for Hughes again. Of course, this belated assertion contradicted Hughes' earlier admission to the EEOC that "*Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.*" J.A. at 19a.

Significantly, Hughes could not identify the origin, history, or scope of its alleged unwritten custom of prohibiting the rehire of employees terminated for misconduct.

Moreover, in stark contrast to Hughes' alleged unwritten oral custom of prohibiting the re-employment of individuals previously terminated for misconduct, Hughes' *written* personnel policies provided that if a job applicant for employment tested positive for drugs or alcohol, the applicant is only rendered ineligible for employment with Hughes for the following twelve months. Hughes' written personnel policies also provided that an applicant who admitted to former drug or alcohol use could be considered for employment if the drug screen of the applicant returned negative.

Thus, the unwritten, oral custom that Hughes claimed served to bar Mr. Hernandez from competing for the job openings was at odds with Hughes written, formal personnel policies regarding drug abuse.

In any event, the district court granted Hughes' motion for summary judgment without explanation on January 30, 2001, and dismissed Mr. Hernandez's complaint.

Mr. Hernandez timely appealed from the district court's judgment.

The Court of Appeals reversed the district court's judgment for two reasons.

First, based on Hughes' express admission that "Hernandez's application was rejected based on [1] his demonstrated drug use while previously employed, and [2] the complete lack of evidence indicating successful drug rehabilitation," the Ninth Circuit concluded that a material factual dispute existed regarding the question of Hughes' intent in terminating Mr. Hernandez and hence summary judgment was precluded. *Hernandez v. Hughes Missile Systems Company*, 298 F.3d 1030, 1034 (9th Cir. 2002).

Second, the Court of Appeals also concluded that Hughes' alleged custom of automatically excluding former employees discharged for misconduct from the applicant pool violated the ADA as applied to Mr. Hernandez because (1) the misconduct that resulted in Mr. Hernandez's discharge consisted only of testing positive for illegal drugs, (2) that status was causally related to his drug addiction, and (3) Mr. Hernandez was now in recovery. *Id.* at 1036-1037.

This Court granted Hughes' Petition for a Writ of Certiorari on February 24, 2003, 123 S. Ct. 1255.

ARGUMENT

1. Hughes had direct, actual notice of Mr. Hernandez's disability.

Hughes claims that "it is undisputed that the decisionmaker [who excluded Mr. Hernandez's application from the applicant pool, a labor relations representative named Joanne Bockmiller] did not know that Hernandez was 'disabled' within the meaning of the ADA." *Brief for Petitioner*, p. 29.[2]

This assertion is belied by the record.

First, it is undisputed that Mr. Hernandez's application to Hughes contained a letter regarding his successful struggle against alcoholism written on his behalf by Mr. John L. Lyman, M.S. Joint Appendix 14a-15a. Mr. Lyman had extensive experience in working with recovering alcoholics, and he worked with Mr. Hernandez at Alcoholics Anonymous. *Id.* In his letter of April 26, 1993, Mr. Lyman wrote that:

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2. In its opinion, the Court of Appeals concluded that "it is not disputed that Hernandez was 'disabled' within the meaning of the ADA at the time he resigned in lieu of termination, and a record of that disability existed." *Hernandez v. Hughes*, 298 F.3d at 1034 n.9. In its Petition for a Writ of Certiorari, Hughes did not seek this Court's review of the Court of Appeal's conclusion that Mr. Hernandez's addiction to drugs and alcohol constituted a "disability" under the Act.

Nevertheless, in its Brief, at pages 28-29, Hughes faults the Court of Appeals for allegedly undertaking "no analysis of whether Hernandez's drug use ever amounted to an addiction or impaired his ability to engage in any major life activity." (Italics Omitted.) Because Hughes did not seek certiorari on the question of Mr. Hernandez's disability, that issue is not before this Court. *See* Sup. Ct. R. 14.1(a).

Gentlemen:

I have known Mr. Hernandez for almost a year. I have seen him occasionally at his place of employment and frequently at meetings of Alcoholics Anonymous.

I have worked with *recovering alcoholics* for ten years and have screened people for the New Hampshire Department of Motor Vehicles and referrals from state and federal parol boards, among my other duties.

I volunteered to write you on behalf of Joel Hernandez as I have seen steady and consistent progress in his recovery from this disease.

Joel attends A.A. regularly, participates in discussion when appropriate, is maintaining his sobriety, and is in all a good and active member.

Alcoholics Anonymous has clearly been demonstrated as the best recovery tool for alcoholics and Joel's commitment to the program demonstrates to me his willingness to accept responsibility for his recovery.

In summary, I would heartily recommend Joel Hernandez for any position for which he is qualified. He is a diligent and caring individual who seems to merit a *second chance*.

You may, if you wish, contact me at home for further information since I am not currently in formal practice due to health problems.

Sincerely,

John L. Lyman, M.S.

Id. (emphasis added). Based on Mr. Lyman's letter, Hughes had direct notice that (1) Mr. Hernandez suffered from the "*disease of alcoholism*," (2) Mr. Hernandez was "maintaining his sobriety," and (3) Mr. Hernandez "regularly" attended AA meetings and was "in all a good and active member" of Alcoholics Anonymous.

Mr. Lyman's letter also recognized that Mr. Hernandez was seeking employment and that he merited "a second chance." Under the circumstances, the reference to a "second chance" suggested that Mr. Hernandez's previous separation from Hughes was related to his struggle with alcohol and drug addiction.

Finally, Mr. Hernandez's personnel files with Hughes disclosed that he suffered from "alcohol dependence continuous," "cannabis dependence continuous," and "cocaine abuse continuous." *See* J.A. at 30a. Indeed, Mr. Hernandez resigned from Hughes only after he had failed a drug test administered to him after his supervisor suspected that he smelled of alcohol, and Mr. Hernandez's "Employee Separation Form" at Hughes indicated that he had been "DISCHARGED FOR PERSONAL CONDUCT," indicating in parenthesis that he had "quit in lieu of discharge."

Indeed, the simple fact that Hughes knew that Mr. Hernandez was a recovering alcoholic was enough to put it on notice that Hernandez had "a record of an impairment" that might constitute a "disability" under the ADA. *See, e.g., EEOC Technical Assistance Manual*, VIII § 8.2 ("A person who is an alcoholic is an 'individual with a disability' under the ADA"), *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001) (alcoholism is a protected disability under ADA); *Mararri v. WCI Steel, Inc.*, 130 F.3d 1180, 1185 (6th Cir. 1997) ("There is no dispute that alcoholism is a disability within the protection of the ADA").

As the Court of Appeals concluded below,

> It is true that Bockmiller testified that she did not know of Hernandez's history of drug addiction or of the reason for his leaving the company in 1991. However, she also testified that at the time of her review she pulled Hernandez's entire personnel file, which would have included the 1991 drug test results. She also stated that, although she did not remember what Hernandez attached to his application, she would have seen any materials he submitted, which included the letter from his A.A. counselor [John Lyman]. It would be reasonable to infer from the presence of this letter that Bockmiller was aware of the fact that Hernandez was a recovering alcoholic and that, with that knowledge, she would have checked the personnel file to determine the reason for his earlier termination. In short, the Bockmiller evidence, which itself permits an inference that she was aware of Hernandez's positive drug

> test, does not eliminate the question of fact that arises as a result of Hughes's explicit statements to the EEOC that the application was rejected because of Hernandez's prior drug addiction. Thus, Hernandez raises a genuine issue of material fact as to whether he was denied re-employment because of his past record of drug addiction.

Hernandez v. Hughes Missile Company, 298 F.3d at 1034 (9th Cir. 2002). This conclusion is underscored by Ms. Bockmiller's admission that she discussed Mr. Hernandez's separation from Hughes with George Medina, the author of Hughes position statement to the EEOC. J.A. at 57a.

In *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2001), this Court recently noted that when considering a motion for summary judgment,

> the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

In this case, although Joanne Bockmiller claimed that she did not know that Mr. Hernandez had a history of drug and alcohol addiction, she was not a "disinterested witness," but an employee attempting to shield her employer from potential liability. Moreover, Ms. Bockmiller's testimony was impeached by (1) the letter written by John Lyman that was attached to Mr. Hernandez's job application, which Ms. Bockmiller admits was available for her review, (2) the position statement that Hughes provided to the EEOC signed by George Medina admitting that "Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation," J.A. at 19a, and (3) Ms. Bockmiller's admission that she discussed Mr. Hernandez's separation from Hughes with George Medina. *Id.* at 57a.

Under these circumstances, drawing all reasonable inferences in Mr. Hernandez's favor, the Court of Appeals was correct in remanding this dispute to the district court so that a finder of fact could resolve the question of Hughes' alleged discriminatory intent in excluding Mr. Hernandez's job application from the applicant pool.

2. Hughes' alleged unwritten policy of automatically rejecting the job applications of former employees terminated for violating company rules is a pretext for Hughes' discriminatory treatment of Mr. Hernandez.

It was only after the EEOC issued its Letter of Determination concluding that Hughes' treatment of Mr. Hernandez violated the ADA and after the case proceeded to litigation that Hughes claimed—for the first time—that it refused to consider Mr. Hernandez's application based on an alleged unwritten policy of never rehiring former employees terminated for

misconduct. In *Reeves v. Sanderson Plumbing*, 530 U.S. at 147, this Court acknowledged that "[p]roof that the defendant's explanation [of the conduct alleged to be discriminatory by the plaintiff] is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive."

In this case substantial evidence proves that Hughes' alleged reason for excluding Mr. Hernandez's application from the applicant pool was merely a pretext to mask unlawful discrimination.

First, Hughes' assertions regarding its alleged unwritten policy of never rehiring former employees terminated for misconduct were impeached by its initial written submission to the EEOC. Specifically, in the position statement to the EEOC signed by George Medina regarding its treatment of Mr. Hernandez, Hughes admitted that:

> [Mr.] Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.
>
> . . . .
>
> Section 1630.3(b) of the ADA provides that the term "disability" and "qualified individual with a disability" may not exclude an individual who: has successfully completed a supervised drug rehabilitation program and is no longer engaged in the illegal use of drugs; or an individual who is participating in a supervised rehabilitation

> program and is no longer engaging in such use. However, this provision is not applicable to this situation as [Mr. Hernandez] has provided no evidence to demonstrate he has either successfully completed or is currently undergoing drug rehabilitation.[3]

J.A. at 19a. It is important to emphasize that Hughes' *first* explanation for refusing to consider Mr. Hernandez's job application admitted that the refusal was based on Mr. Hernandez's history of drug abuse and that Hughes invoked its "unwritten policy" explanation only *after* it had been sued.

Based on the chronology of Hughes' explanations, a finder of fact could reasonably conclude that the more recent explanation was not factual. *See generally, E.E.O.C. v. Sears Roebuck and Co.*, 243 F.3d 846, 852 (4th Cir. 2001) ("a factfinder could infer from the late appearance of [the employer's] current justification that it is a post-hoc rationale, not a legitimate explanation for [its] decision not to hire [the employee]"), *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) ("We are disquieted . . . by an employer who 'fully' articulates its reasons for the first time months after the decision was made").

Hughes' explanations for its refusal to consider the merits of Mr. Hernandez's application were also contradictory and unconvincing. As the First Circuit recently noted in *Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000):

---

3. Of course, Mr. Lyman's letter of April 26, 1993 regarding Mr. Hernandez's participation in Alcoholics Anonymous constituted the very evidence of rehabilitation that Hughes claimed that Mr. Hernandez had failed to provide.

> When a company, at different times, gives different and arguably inconsistent explanations [regarding its reasons for terminating an employee], a jury may infer that the articulated reasons are pretextual.

See also Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1167 (6th Cir. 1996) ("An employer's changing rationale for making an adverse employment decision can be evidence of pretext"), *Kobrin v. University of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994) ("Substantial changes over time in the employer's proffered reason for its employment decision support a finding of pretext"), *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1422 (7th Cir. 1992) ("A jury's conclusion that an employer's reasons were pretextual can be supported by inconsistencies in or the unconvincing nature of the decisionmaker's testimony").

It is also significant that Hughes' alleged policy is oral and not written. As the court observed in *Dunning v. National Industries, Inc.*, 720 F. Supp. 924, 931 (D. Ala. 1989):

> [T]his court cannot overlook that unwritten policies, as opposed to written policies, can be easily turned into tools of discrimination. . . . These circumstances allow for more discretionary, and therefore potentially more discriminatory, enforcement of the policy.

This conclusion is especially applicable in this case given the fact that no one at Hughes could identify the origin, history, or scope of the alleged unwritten policy.

The alleged unwritten policy was also at odds with Hughes' written personnel policies regarding employee drug abuse. Specifically, Hughes' written personnel policies regarding drug abuse provided that if an applicant for employment tested positive for drugs or alcohol, the applicant was merely rendered ineligible for employment with Hughes for the following twelve months, not forever. Similarly, Hughes' written personnel policies provided that an applicant who admitted to former drug or alcohol use could nevertheless be considered for immediate employment if the drug screen of the applicant returned negative. Finally, Hughes' written personnel policies did not require that employees testing positive for illegal drugs (like Mr. Hernandez) be terminated or not be rehired.

Simply stated, Hughes' alleged unwritten policy could not be rationally squared with its written policies regarding drug use. As the Court of Appeals observed in this regard:

> It is interesting to note that Hughes puts a long time employee who is fired for drug use and has since been rehabilitated in a less favorable position than a new applicant who is a current drug user. Hughes does not exclude from employment a new applicant who may be a drug user. A new applicant must take a drug test in order to qualify for employment. If he tests positive for drug use, he is not automatically excluded from working for Hughes; rather, he is ineligible for 12 months but may re-apply after that time period has passed. In contrast, a long time employee who slips is barred forever.

Hernandez v. Hughes Missile Systems, 298 F.3d at 1036 n.16. These facts rendered the very existence of Hughes' alleged unwritten policy suspect.

Under these circumstances, in accordance with the standards set forth by this Court in *Reeves*, the Ninth Circuit was correct in remanding the dispute for resolution by a finder of fact.

3. Hughes' alleged unwritten rule of never rehiring former employees terminated for violating company policy violates the ADA as applied to Mr. Hernandez.

Even assuming for purposes of argument that Hughes' alleged unwritten rule of never rehiring former employees terminated for violating company policy actually exists, and that the rule was not misused as a pretext for Hughes's discriminatory treatment of Mr. Hernandez, the rule would nevertheless violate the ADA as applied to Mr. Hernandez.

Hughes describes its unwritten "rule" as "uniform," "blanket," "flat," and permitting of no "exceptions." *See Brief of Petitioner*, p. 3. However, the ADA expressly applies to hiring rules (like the unwritten rule in this case), *see* 42 U.S.C. § 12112(a), and prohibits "exclusionary qualification standards" that prevent the disabled from "fully participating" in the workforce. *See* 42 U.S.C. § 12101(a)(8).

Specifically, under the Act, an employer "discriminates" against an otherwise qualified individual with a disability if the employer uses

> qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability . . . unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related

> for the position in question and is consistent with business necessity.

42 U.S.C. § 12112(b)(6).

In this case, Hughes makes no attempt to demonstrate that its rule regarding the rehiring of former employees terminated for violating company rules is "job-related" as to the position for which Mr. Hernandez applied, a "Product Test Specialist." In fact, based on the fact that Hughes claims that its unwritten rule applies to all "positions" at Hughes, it would be impossible for Hughes to establish that the rule was somehow related to the particular position for which Mr. Hernandez applied.

Nor has Hughes made any showing that its alleged rule is consistent with "business necessity." Indeed, Hughes would be precluded from even attempting to make such a showing at this late juncture, because it failed to do so in *both* the district court and the Court of Appeals. *See Hernandez v. Hughes Missile Systems*, 298 F.3d at 1037 n.19 ("We note that Hughes has not raised a business necessity defense, *see* 42 U.S.C. § 2113(a), and we do not consider when, if ever, such a defense might be available with respect to the hiring of a rehabilitated drug addict").

This conclusion is especially applicable in this case based on the alleged "uniform" and "blanket" nature of Hughes' unwritten rule. As this Court recognized in *PGA Tour v. Martin*, 532 U.S. 661, 688 (2001), an entity covered by the Act must make an "individualized inquiry" *before* refusing to modify its "policies, practices, or procedures" in order to accommodate a "particular person's disability."

Because Hughes failed to even attempt to make such an "individualized inquiry" before (or after) it decided to exclude Mr. Hernandez's job application from the applicant pool, Hughes violated Mr. Hernandez's rights under the ADA.

Although Hughes asserts that "regarded as" and "record of" ADA plaintiffs are not entitled to reasonable accommodations, Petitioner's Brief at p. 18, this assertion is refuted by the specific language of the statute. Specifically, the Act provides that:

> It may be a defense to a charge of discrimination under this Act that an alleged application of qualifications standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job related and consistent with business necessity, and such performance cannot be accomplished by *reasonable accommodation*, as required under this title.

(Emphasis added.) Accordingly, the express language of the Act requires that an employer's qualification standards must be modified in order to accommodate an otherwise qualified disabled individual, unless the employer can show that the accommodation is inconsistent with "business necessity." The Court's opinion in *PGA Tour v. Martin*, 532 U.S. 661, 688 (2001), reflects this principle.

Finally, Hughes claims that the "second chance" that Mr. Hernandez allegedly seeks from Hughes is not a "reasonable" accommodation in any event, *see Brief of Petitioner* at p. 23. In fact, Mr. Hernandez is *not* asking for a

second chance. Mr. Hernandez resigned from Hughes in lieu of termination as a result of testing positive for cocaine. Mr. Hernandez has suffered the consequences of that mistake, being forced to leave the job that he had held for twenty-five years and losing his salary and attendant benefits.

When Mr. Hernandez applied to Hughes in January of 1994, he did not ask for a "second chance" by trying to get his old job back. Instead, he sought only the opportunity to *compete* for a new job at Hughes. The ADA requires nothing less.

CONCLUSION

For the reasons set forth above, this Court should AFFIRM the judgment of the Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Rule 29.6 Statement was set forth at page ii of Petitioner's Opening Brief, and there are no amendments to that Statement.

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Neither Hernandez nor his *amici* has made any substantial effort to defend the Ninth Circuit's opinion in this case. Instead, they advance new arguments as alternative theories that, they say, can justify affirmance. But the flight from the Ninth Circuit's rationale is not a reason to dismiss the writ (as Hernandez's *amici* suggest), but rather a reason to reverse the judgment. The proffered alternative arguments lack merit. We discuss the three possible ADA theories — disparate treatment, denial of reasonable accommodation, and adverse impact — in turn.

I. There Was No Disparate Treatment; Hernandez Was Treated The Same As All Other Employees Involuntarily Terminated For Misconduct

A. Because Hernandez Was Treated Exactly The Same As All Others Ineligible For Rehire, There Was No Disparate Treatment Based On Disability

Petitioner's opening brief demonstrated that Hughes treated all of its employees — the disabled and the nondisabled — in precisely the same fashion. Every employee who engaged in workplace misconduct serious enough to warrant involuntary termination faced two invariable consequences: (i) discharge; and (ii) ineligibility for rehire. Hughes thus did not engage in disparate treatment — "discriminate" — against Hernandez.

The National Employment Lawyers Association ("NELA"), notes that the ADA was intended to ensure "equal opportunities to individuals who have successfully recovered from addiction." (NELA Br. at 10.) We have no quarrel with that position. Hernandez (for purposes of the disparate treatment theory) was entitled to equal treatment, to be free from discrimination — nothing more. Equal treatment he received. Hughes applied to Hernandez the same no-rehire rule it applies to others involuntarily terminated for misconduct.

1. Hernandez contends that Hughes did not "really" have a no-rehire rule or that its application to him was pretextual. He contends that Hughes' position statement to the EEOC admitted that Hughes rejected him for rehire because of his record of addiction and supposed lack of rehabilitation. Therefore, he contends, a reasonable factfinder under *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147 (2001), could conclude that the no-rehire rule was a "belated assertion" that surfaced "only *after* [Hughes] had been sued" and thus was a pretext for intentional discrimination. (Resp. Br. at 19, 28.)

Hernandez is wrong. Even the Ninth Circuit agreed that "[t]here is no question that Hughes applied this [no-rehire] policy in rejecting Hernandez's application." (Pet. App. 12a n.17.) On this point the Ninth Circuit plainly was correct, and nothing in Hughes' EEOC response is to the contrary. The letter recited the relevant facts from 1991: Hernandez failed a drug test administered because he "arrived at work demonstrating signs of aberrant behavior including bloodshot eyes, unsteady gait and slurred speech." J.A. 18a.[1] The letter then explained why Hernandez had no viable ADA claim. (J.A. 19a-20a.) The letter first pointed out that there was no reason to believe Hernandez was even covered by the ADA at the time of his reapplication,

1. Hernandez now asserts that he had only "trace amounts of cocaine in his urine" (Resp. Br. at 12), and his *amicus* implies that he and other drug users are ensnared by positive test results even if the user has taken pains not to commingle drug use and work time. (*See* NELA Br. at 12.) In fact, Hernandez had twice the amount of cocaine in his system necessary for a positive test result. (Exhibit F to Hughes' Motion for Summary Judgment.) Moreover, Hernandez admitted that he reported for work that day after staying up most of the prior night drinking alcohol and snorting cocaine. (J.A. 34a, 36a.) He presented himself for work on military missile systems while apparently under the influence; he was subjected to testing based on this reasonable suspicion; and the test confirmed what visual observation had suggested: very recent use. Quite properly, Hernandez never challenged the propriety of Hughes' decision to terminate him.

since his application did not disclose a prior drug addiction (let alone claim rehabilitation), and the ADA does not cover current drug users. 42 U.S.C. § 12114(a).

Moreover, Hughes' defense did not rise or fall on that issue. The very next paragraph of Hughes' EEOC response refuted Hernandez's current contention that Hughes did not "really" have a policy making involuntarily terminated employees ineligible for rehire. The letter stated, in relevant part:

> The Company maintains it[s] right to deny re-employment to employees terminated for violation of Company rules and regulations. . . . Complainant's conduct while employed by [Hughes] makes him *ineligible for rehire*.

(J.A. 20a; emphasis added.)

The issue on summary judgment was whether a reasonable factfinder could conclude that Hughes fabricated the existence of the no-rehire policy. *Reeves*, 530 U.S. at 146-47. The answer clearly is "no," because: (i) Bockmiller testified that the policy existed (J.A. 57a); "[B]ased on the practice that we had, the individual would not be eligible for re-hire"); (ii) Medina so testified as well (J.A. 80a; Hernandez "violated company practice, policies, rules, whatever, and our practice has always been that they don't get reemployed"); (iii) Hernandez had two years of discovery to contradict this testimony, or to find evidence that exceptions had been made to the rule, but he failed to do so (and he also failed to ask for more time under Fed. R. Civ. P. 56(f) to conduct additional discovery on that issue);[2]

2. Hernandez's *amici* note that, after this litigation commenced, Hughes offered Hernandez the unconditional opportunity to take a pre-employment skills qualification test in 1999 (Hernandez took the test but failed). (Betty Ford Center Br. at 9.) But it is not remarkable that, after the inception of this litigation, Hughes searched for a cost-effective

(Cont'd)

(iv) Hughes' EEOC letter specifically referenced the policy; and (v) Hughes' policy is commonplace throughout industry (*see* Brief for Equal Employment Advisory Council and U.S. Chamber of Commerce as *amici curiae*). No reasonable factfinder could disagree with what the Ninth Circuit itself stated (Pet. App. 12a n.17): "there is no question" that Hughes had a no-rehire rule and applied it in Hernandez's case.

2. Hernandez's *amici* argue that a no-rehire rule is inconsistent with what they posit as the "ideal" of rehabilitation. They are incorrect. Hughes then, and its successor Raytheon now (and virtually every large American employer), fully support (and in many cases financially underwrite the cost of) rehabilitation where individuals voluntarily come forward and seek treatment. For example, when Hernandez voluntarily sought treatment in 1986, Hughes accommodated him. Immediately following the 1986 treatment, Hernandez (unbeknownst to Hughes) again began abusing drugs. (J.A. 32a.) But this case is not about seeking voluntary treatment. In 1991, Hernandez never sought any treatment at all; he came to work just hours after a binge and tested positive for drug use. (J.A. 33a-34a.) The issue here is not what happens when an individual voluntarily seeks treatment, but what rights an employer has to discipline those who *do not* seek treatment and are caught violating work rules.

Hernandez was treated just like every other person committing a serious rules violation at Hughes. He was:

(Cont'd)
method of resolving the dispute or minimizing its legal exposure out of an abundance of caution. This Court itself has endorsed the making of (and enforced the consequences of refusing) unconditional offers of reinstatement. *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982). The offer to Hernandez does not at all undermine the *bona fides* of the no-rehire rule as it existed five years earlier.

(i) discharged; and (ii) declared permanently ineligible for rehire. There was no disparate treatment based on drug use or addiction in applying to him the standard terms of Hughes' no-rehire rule.

B. Bockmiller, The Decisionmaker, Did Not Even Know About Hernandez's Protected Status, Let Alone Harbor Discriminatory Animus

Hernandez's efforts to show intentional disparate treatment were particularly ineffective because the rehire decisionmaker, Bockmiller, was completely unaware of the sort of misconduct that had led to Hernandez's discharge. Bockmiller testified without contradiction that she did no more than review the "Employee Separation Summary" on the top of Hernandez's personnel file (J.A. 12a). When she read the words "Discharge[d] for personal conduct (Quit in lieu of discharge. . . .)," her review ended. (J.A 22a.) It made no difference whether the misconduct was insubordination, gambling on premises, theft, sexual harassment, fighting, or drug use. All of this is uncontradicted in the record.

Hernandez claims, however, that a jury might conclude that Bockmiller was lying — that she not only knew Hernandez had been a drug abuser but also based her decision on that fact. He cites: (i) the letter from Hernandez's social worker attached to his application; (ii) the fact that Bockmiller (had she chosen to look) had access to documents that would have revealed his prior drug abuse; and (iii) the wording of Hughes' letter to the EEOC. (Resp. Br. at 22-29.)

But the social worker's letter refers only to Hernandez's alcohol abuse, not to his alleged addiction to drugs (J.A. 14a-15a), and Hernandez does not even claim that he was disqualified from rehire because he formerly used alcohol. That Bockmiller *could have* investigated further and learned about Hernandez's drug use does not support a reasonable inference that she *actually did so*, particularly where she testified to the contrary. A plaintiff

cannot avoid summary judgment "by merely asserting that the jury might . . . disbelieve the defendant's" testimony. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). That is especially true here because there was no reason for Bockmiller to investigate further after reading the dispositive language in the Employee Separation Summary that rendered Hernandez ineligible for rehire.

As for Hughes' EEOC response letter, it specifically referred to the policy that made Hernandez ineligible for rehire. Bockmiller testified without contradiction that she relied upon that policy in rejecting Hernandez's application. No reasonable factfinder could conclude anything other than that: (i) Bockmiller made the decision based on the no-rehire policy, and she treated Hernandez's application the same as any other application for rehire where the applicant earlier had been involuntarily terminated because of misconduct; and (ii) Bockmiller had no knowledge of Hernandez's prior drug use, let alone a discriminatory animus toward recovering addicts.

Hernandez and his *amici* claim, however, that Hughes' evidence was incompetent to support summary judgment because that evidence came from its employees. Such persons, the Court is told, should be disbelieved; they allegedly are "interested" in the litigation because of their employment at Hughes. (Resp. Br. at 25-26; Betty Ford Center Br. at 7.) Hernandez and his *amici* cite this sentence in *Reeves*:

> [In considering a motion for summary judgment,] the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

530 U.S. at 151.

This language in *Reeves* does not justify dismissing Hughes' evidence. To so read it does violence to the Court's cases before *Reeves* and since. As far back as *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209 (1931), for example, the Court held that the trial court "is *not* at liberty to disregard the testimony of a witness [solely] on the ground that he is an employee of the defendant, in the absence of conflicting proof. . . . The fact . . . that the witness was an employee of the [moving party] . . . [is] not enough." *Id.* at 214, 216 (emphasis added). More recently, in *Clark County School District v. Breeden*, 532 U.S. 268, 273-74 (2001), this Court unanimously reinstated a summary judgment against an employee based largely on an affidavit of the defendant employer's manager.

Labeling all employees as "interested" — and thus suspect — witnesses would effectively preclude the use of summary judgment in employment cases. The Court in *Reeves* did not mean that a court considering a summary judgment motion must, should, or even can ignore the testimony of the one person normally uniquely situated to testify about the reason for an individual's discharge (or other adverse employment decision): the supervisor or other decisionmaker. If company employees' testimony cannot support a motion for summary judgment, as Hernandez contends, employment cases would be effectively exempt from the normally applicable summary judgment rules because employers *inevitably* are forced to rely on their managers for factual evidence supporting their employment decisions.[3]

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3. *E.g.*, *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 898 (5th Cir. 2002) ("The definition of an interested witness cannot be so broad as to require us to disregard testimony from a company's agents regarding the company's reasons for discharging an employee."), (Cont'd)

This is not the law, as the *Reeves* Court itself made clear; lower courts should reject any construction of the rules of procedure that would "insulate [the] entire category of employment discrimination cases from [summary judgment] review . . . ." 530 U.S. at 148 (citation omitted).

No factfinder would have been entitled to reject the uncontradicted testimony of summary judgment declarants Medina and Bockmiller — testimony, by two persons who did not even know Hernandez, that Hernandez could not rebut after two years of discovery.

In sum, it is undisputed that Hughes had a no-rehire policy and that it refused to reemploy Hernandez because of that policy. There was no disparate treatment.

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cert. denied, 123 S. Ct. 2572 (2003). In *Traylor v. Brown*, 295 F.3d 783, 791 (7th Cir. 2002), the court observed:

> We do not interpret the quoted language [from *Reeves*] so broadly as to require a court to ignore the uncontroverted testimony of company employees or to conclude, where a proffered reason is established through such testimony, that it is necessarily pretextual. To so hold would essentially prevent any employer from prevailing at the summary judgment stage because an employer will almost always have to rely on the testimony of one of its agents to explain why the agent took the disputed action.

II. There Was No Unlawful Failure To Grant Hernandez Preferential Treatment; Only Persons Actually Disabled Are Entitled To Reasonable Accommodation, And A "Second Chance" Is Not A Required Accommodation In Any Event

A. "Regarded As" And "Record Of" Plaintiffs Are Entitled Only To Nondiscrimination — Not To Preferential Treatment

Hernandez all but ignores the arguments made in the opening brief on the issue of reasonable accommodation. But his *amici* claim that Hernandez was entitled to reasonable accommodation, notwithstanding the language of the statute, which only requires employers to "mak[e] reasonable accommodations *to the known physical or mental limitations of an otherwise qualified individual with a disability*. . . ." 42 U.S.C. § 12112(b)(5)(A)-(B) (emphasis added). Hernandez concedes that, when he reapplied, he had no such "limitations"; his ADA rights (if any) arose solely under the ADA's "regarded as" and "record of" prongs, as the Ninth Circuit correctly stated. (Pet. App. 6a n.8.) Because Hernandez had no actual "limitation" when he reapplied, there was nothing for Hughes to accommodate.

Hernandez's *amicus* NELA argues, however, that "regarded as" and "record of" plaintiffs may be entitled to an accommodation. NELA asserts that people "who are protected [by statute] due to their rehabilitated drug addiction have a present impairment." (NELA Br. at 27 & n.29.) That assertion does not withstand scrutiny; a drug addict is fundamentally different from a *rehabilitated* drug addict. The former is not protected by the ADA at all, even if that drug use might have caused a physical or mental impairment that substantially limits a major life activity. That is so because of the ADA's categorical

disqualification of current drug users. 42 U.S.C. § 12114(a). Once the addict has been rehabilitated, the existence of an ADA-qualifying physical or mental impairment normally would disappear as well, which means there would remain no impairment requiring accommodation.

In any event, regardless of whether some hypothetical rehabilitated drug addict might remain impaired, Hernandez did not. He testified that at the time *he* reapplied he was not limited in any respect, and that he had been drug-free for well over a year. (*See, e.g.*, Hernandez Dep., 75:18-25.)[4] Thus, even if it were possible to conceive of some rehabilitated drug addict who continued to have a substantially limiting physical or mental impairment, Hernandez was not such a person. As the Ninth Circuit correctly noted:

> Hernandez does not claim that he was actually disabled at the time he applied to be rehired by Hughes in 1994. Rather, he argues that he was not rehired because of his record of disability, and/or because he was regarded as being disabled. The parties agree that Hernandez's claim of discrimination is limited to either a "regarded as" or a "record of" definition of disability.

(Pet. App. 6a & n.8.)

Because Hernandez was only a "regarded as" or "record of" plaintiff, no reasonable accommodation obligation was owed.

4. Hernandez never claimed (let alone proved) that he *ever* suffered from any incapacity in performing major life activities, even when he was using drugs. *Cf. Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 196-99 (2002) (requiring such proof as part of the prima facie case). For all the record revealed, Hernandez was a recreational drug user who one day simply decided to stop without any form of treatment. (J.A. 44a.)

B. A "Second Chance" Is Not A Reasonable Accommodation

Hernandez did not offer a meaningful response to the long line of court of appeals authority that holds that a "second chance" is not a reasonable accommodation.[5] His only response is to assert in conclusory fashion that he is "*not* asking for a second chance." (Resp. Br. 33-34.) This assertion is belied by Hernandez's statement elsewhere in his own brief "that Mr. Hernandez . . . merited 'a second chance.'" (*Id.* at 23.)

Hernandez's *amici* do not deal with the "second chance" issue any more persuasively. The ADA makes clear that employers can hold drug users "to the same qualification standards for employment or job performance or behavior that such entity holds other employees." 42 U.S.C. § 12114(c)(4). A "second chance" requirement would eviscerate that right. An employee lawfully could be discharged for misconduct (like using drugs); the individual could reapply, claiming rehabilitation; the employer could truthfully state that it was declining to rehire pursuant to its standard policy of not rehiring persons discharged for misconduct; and the individual could say "Gotcha, I am entitled to a second chance because my misconduct could be related to a disability." Surely the ADA

5. Conspicuously absent from the briefs of Hernandez and his *amici* is a citation to even one decision, by any court at any level, holding that an employer can be compelled to rehire a lawfully terminated individual as a reasonable accommodation. The one case proffered by the Betty Ford Center (Br. at 24), *Herman v. City of Allentown*, 985 F. Supp. 569 (E.D. Pa. 1997), does not so hold, and in fact it supports the Company's position. *Herman* did not involve a no-rehire rule of the sort at issue here, but rather a no-rehire decision made on an ad hoc, and indeed discriminatory, basis. The court held that the defendant city "was *not* required to rehire Mr. Herman under the ADA in the first place. But, once the City agreed to rehire the Plaintiff, it could not discriminate against the Plaintiff in the re-hiring process." *Id.* at 576 (emphasis added).

does not contemplate this sort of revolving door. Hernandez's *amicus* NELA concedes, as it must, that employers can "prohibit the use of illegal drugs." (NELA Br. at 13, *citing* 42 U.S.C. § 12114(c)(1) & (2).) But the "prohibition" would be feckless if the individual could evade it simply by reapplying. Once an employee is lawfully discharged (as Hernandez was here), employers are entitled to insist that the separation be permanent.

Hernandez's *amici* assert that it is in everyone's interest for a drug addict to seek rehabilitation. (NELA Br. at 10; Betty Ford Center Br. at 15-16.) *Amici* then argue that drug addicts will not be motivated to seek rehabilitation if they will be unable to get jobs. *Amici* paint a distressing picture of a class of reformed drug addicts unable to find work because of exclusionary employer policies. (NELA Br. at 11; Betty Ford Center Br. at 2; *see also* Resp. Br. at 8-10.)

That distressing picture is an illusion. Hernandez's *amici* argue as if all employers were free to bar perpetually from employment anyone who had ever used drugs. But employers cannot — and Hughes did not — disqualify all rehabilitated drug addicts from employment. Only persons involuntarily terminated *by* Hughes for misconduct *at* Hughes are barred. Hernandez, for example, is entitled under the ADA to have his future job applications considered on their merits by every employer in the United States — except for Hughes, the company from which Hernandez earlier had disqualified himself by reason of misconduct. And every ADA-covered employer, including Hughes, must consider on a nondiscriminatory basis every applicant who is a rehabilitated drug user, except the applicant(s) that this same employer earlier lawfully discharged for misconduct. Thus, the specter of a class of "reformed drug

addicts unable to find work" grossly misrepresents the very limited effect of no-rehire rules.[6]

Hernandez's *amici* contend, however, that the ADA was designed to provide "incentives" for treatment and rehabilitation, and that second chances provide these incentives. (NELA Br. at 11.) In fact, requiring employers to grant second chances provides exactly the opposite incentive, because the second-chance requirement would assure drug users one free bite at the apple — and thus would provide a distinct *dis*incentive to early treatment and rehabilitation. An individual could continue to use drugs, comfortable in the knowledge that he or she might never be detected, and that even if detected, a statutory second (or third or fourth) chance would be made available simply by asserting that "a disability made me do it." If the "incentive" to seek treatment animated Congress in drafting the ADA, Hughes' no-rehire rule reinforces rather than undermines that incentive.

Labor law has long recognized how the "incentive" works; there is a fundamental difference between seeking treatment: (i) voluntarily and proactively, as opposed to (ii) involuntarily upon detection. As one labor arbitrator put it:

> It is true that [grievant] admitted his [drug] use and asked to be placed in a rehabilitation program. However, none of this was done until after he got "caught in the act" through the security investigation. Many employers would not allow someone caught in the act to then "volunteer" to enter an [employee

---

6. The authorities cited by Hernandez's *amici* (NELA Br. at 24 & n.25; Betty Ford Center Br. at 9-16), including the EEOC's Technical Assistance Manual, thus are inapposite. They simply explain what a *new* prospective employer may and may not do when a recovering addict applies in the first instance.

> assistance] rehabilitation program — one is eligible only if they come forth and volunteer prior to being caught in the act.

Federal Aviation Administration, 93 Lab. Arb. (BNA) 41, 46 (1989) (Allen, Jr., Arb.); *accord Cajun Elec. Power Coop, Inc.*, 108 Lab. Arb. (BNA) 641, 648 (1997) (Howell, Arb.) (allowing an employee to escape discipline by seeking assistance with substance abuse after testing positive would "send to employees a message that all one need do to avoid discharge for reporting to work under the influence would be to seek rehabilitation").[7]

This longstanding principle provides the response to the contention of Hernández's *amici* that Hernandez simply was punished for his (supposed) addiction, *i.e.*, for "using drugs while an addict." (*E.g.*, NELA Br. at 12; Betty Ford Center Br. at 3, 4, 16, 17, 20, 27.) Hernandez's offense was *reporting to work* after snorting cocaine all night, not for using drugs in the first place.

The employer's modest contention here — which gives force to the ADA's text in 42 U.S.C. § 12114(c)(1) (employers "may prohibit the illegal use of drugs"), and § 12114(c)(4) (employers "may hold an employee who engages in the illegal

7. *See also Kosmos Cement Co.*, 114 Lab. Arb. (BNA) 1811, 1812 (2000) (Lalka, Arb.) (applying policy that provided amnesty for employees who voluntarily admitted drug problem before a "triggering" incident occurred but provided "no second chances" for employees who test positive for illegal drugs); *Stanley Door Sys.*, 89-1 Lab. Arb. Awards (CCH) ¶ 8141 (CCH 1988) (Doering, Arb.) ("[A]ssertion of a dependency at point of discharge is not a proper basis for mitigation. . . . *To accept such assertions as a basis for mitigation of discharge would . . . mak[e] it unnecessary for employees to face up to substance abuse any time before the axe actually fell.*") (emphasis added). Some state statutes are to similar effect. Cal. Lab. Code § 1025 (prohibiting discharge of persons "voluntarily" seeking rehabilitation, but permitting discharge of drug users in other circumstances).

> use of drugs . . . to the same qualification standards for employment . . . that [it] holds other employees") — is simply that an employer is entitled to decide that it will not rehire persons that it lawfully discharged. That measured response does not jeopardize more than a tiny fraction of employment opportunities for rehabilitated drug users. And to the extent that there is any jeopardy at all, it is a salutary one: it enhances the incentive for seeking early treatment and rehabilitation. Nothing in the ADA's reasonable-accommodation obligation is to the contrary.

III. No Adverse Impact Claim Is In This Case, And For Good Reason: There Would Be No Merit To It

No adverse impact claim is presented here; it was waived in the lower courts, as the Ninth Circuit stated. (Pet. App. 13a n.20.)[8] Thus, only the disparate treatment and reasonable accommodation issues are before this Court. Hernandez's (half-hearted) and NELA's (more strenuous) effort to inject a new theory into the case simply underscores the flawed reasoning in the Ninth Circuit's decision. Hernandez's *amici* suggest that the writ of *certiorari* should be dismissed. (NELA Br. at 2-5 & nn.4-5.) The *amici* seem to imply that, but for the inadvertence of Hernandez's counsel, there would have been a viable adverse-impact attack on Hughes' no-rehire rule. NELA's desire to preserve the Ninth Circuit's opinion is understandable, but its contentions for dismissal of the writ are unsound.

The adverse-impact theory is not in this case because there is no plausible basis to challenge a no-rehire rule under that theory. First, Hernandez was not disqualified from rehire "because of [a] disability." The ADA provides:

8. Hernandez's *amicus* NELA agrees that no adverse impact claim is presented here. (NELA Br. at 2 & n.4.)

> No covered entity shall discriminate [defined in § 12112(b)(6) to include the use of "qualification standards, employment tests or other selection criteria that *screen out or tend to screen out* an individual with a disability or a class of individuals with disabilities"] against a qualified individual with a disability *because of the disability of such individual* in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (emphasis added).

Hernandez, however, was not "screened out" by Hughes "because of" his disability, *i.e.* his "record of" drug addiction. Hernandez was not rehired because he violated Hughes' rules of conduct. His violations of course happened to be factually related to drug use,[9] but his discharge and disqualification from rehire were not "because of" drug use or any disability. The no-rehire rule applied to a wide variety of misconduct discharges,

9. Drug *use* is not the same as drug *addiction*. As the Solicitor General pointed out in his brief, there is no reason even to believe that the effects of a drug-use rule fall principally on addicts. (Br. for United States at 15-16.) "Recreational" users of drugs vastly outnumber addicts, and thus the impact of even a no-drugs-at-work rule actually falls more heavily on such "recreational" users, who are not ADA-protected while they are using drugs or after they stop. According to recent statistics compiled by the U.S. Substance Abuse and Mental Health Services Administration, over 15.9 million Americans are current users of illegal drugs. But barely a third of that number, 5.6 million, show symptoms of addiction. *See* Office of Applied Studies, 2001 National Household Survey on Drug Abuse (NHSDA), *at http://www.samhsa.gov/oas/nhsda/2k1nhsda/vol1/highlights.htm* (last visited Aug. 18, 2003). In any event, Hernandez never attempted to prove the relationship between drug use and addiction that he now hypothesizes.

not just to drug cases. Hernandez never attempted to demonstrate an adverse impact on the group of disabled Americans (or even on the sub-group of recovered addicts), and there is no reason to believe (absent reliance on the very stereotypes Hernandez and his *amici* presumably would decry), that such proof of adverse impact exists. Surely the disabled do not engage in the range of serious work-related misconduct that triggers the no-rehire rule — fighting, insubordination, drug use, gambling, theft, sexual harassment, and the like — significantly more often than the nondisabled. Without this sort of proof, no adverse impact claim would be possible.[10]

There is no adverse impact even on the sub-group of drug users and addicts. The following hypothetical illustrates why. Suppose that Hernandez's application for rehire arrived at Hughes the same day as those of three other applicants, *A*, *B*, and *C*, who have histories of drug use and rehabilitation identical to that of Hernandez. Neither *A* nor *B* had worked for Hughes previously. Candidate *A* had been terminated by some other company for drug-related misconduct. Candidate *B* had applied for a job at Hughes more than a year earlier, but he was rejected then because of a positive preemployment drug test. Candidate *C* worked for Hughes but rather than come to work under the

10. Hernandez's amicus NELA argues that, because § 12112(b) (quoted in part above), can proscribe rules that "tend to" screen out "an individual," adverse impact under the ADA is fundamentally different from other discrimination laws. Not so. Title VII, for example, also applies to rules that "tend to" impact "any individual," 42 U.S.C. § 2000e-2(a)(2), and yet under Title VII it is well established that an individual advancing an adverse impact claim must prove a disproportionate impact on a protected group to which the individual belongs. *See, e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988) (disparate impact analysis requires proof that "facially neutral employment practices . . . have significant adverse effects on protected *groups*. . . .").

influence of drugs, he resigned and sought treatment. If Hughes' rule had an adverse impact "because of" prior drug addiction, the rule would exclude (or at least would "tend to" exclude) all four applicants in this hypothetical. But in fact Hughes' no-rehire rule treats Candidates *A*, *B*, and *C* differently from — and more favorably than — Hernandez. Hernandez of course is ineligible for rehire under the rule. But Candidates *A*, *B*, and *C* are eligible for hire notwithstanding their *identical* "records of" drug addiction and claims of rehabilitation; the rule has no effect whatsoever on them. It follows that it was Hernandez's *misconduct while employed* (and consequent discharge for cause), not his drug use or possible drug addiction, that disqualified him. Hernandez therefore cannot claim to have been "screen[ed] out" "because of the disability" within the meaning of § 12112(a) & (b)(6).

In any event, any adverse impact would be beside the point by reason of § 12114(c)(4). Hernandez violated Hughes' drug-free workplace rule, and the consequences were: (i) involuntary termination; and (ii) ineligibility for rehire.[11] Thus, any adverse-impact claim here necessarily must attack the drug-free workplace rule and its corollaries. But the text of the ADA itself provides the defense to such an attack. Whatever the "business

11. These consequences attached at the time of his positive drug test. The later rejection of Hernandez's rehire application was simply the "delayed, but inevitable consequence" of the original discharge. *Cf. Delaware State College v. Ricks*, 449 U.S. 250, 257-58 (1980) (for a college professor, discharge automatically followed a year after denial of academic tenure). "It is simply insufficient," this Court explained in *Ricks*, "to allege that [a more-recent development] 'gives present effect to the past . . . act.'" *Id.* at 258 (citations omitted). "That is so even though one of the effects of the [initial decision] . . . did not occur until later." *Id.* "[The] proper focus is upon the . . . [first decision]," the *Ricks* Court concluded, and "not upon the time at which the consequences of [that first decision] became most painful." *Id.* (citations and internal quotations omitted).

necessity" defense might mean under the ADA in other cases, the defense exists as a matter of law here. Congress dealt specifically with the issue of drug use and stated that an employer may do exactly what Hughes did here: "hold an employee who engages in the illegal use of drugs . . . to the same qualification standards for employment" — in this case, discharge and ineligibility for rehire — "that such [employer] holds other employees." 42 U.S.C. § 12114(c)(4). No adverse-impact claim can attack an employer rule that the statute expressly makes lawful.

As a practical matter, applying the disparate impact theory in the manner suggested by NELA — where the plaintiff need only show that the employer's rule has an adverse impact on a group of one — would render irrelevant the reasonable accommodation aspects of the statute. Garden-variety ADA accommodation disputes, now measured against the well-understood test of "reasonableness" (on which the employee bears the burden) would be replaced by disparate impact cases, resolved on considerations of "business necessity" (which the employer must prove). That plainly is not the framework that Congress wrought; if Congress intended "adverse impact on a group of one" claims to be cognizable, "reasonable accommodation" liability never would have found its way into the statute in the first place.[12]

12. Hernandez and his *amici* repeatedly contend that Hughes never attempted to prove that "business necessity" supported its no-rehire policy. (*E.g.*, Resp. Br. at 31-33; NELA Br. at 8, 19 n.21, 25; Betty Ford Center Br. at 3, 6, 28-30.) But Hughes was never obligated to prove anything. No prima facie case of adverse impact was established; no defense was required, *e.g.*, *Gonzales v. City of New Braunfels*, 176 F.3d 834, 839 n.26 (5th Cir. 1999) (no need to adduce proof on a defense not implicated), and the language of § 12114(c) makes "qualification standards" like this one categorically lawful in any event. The cases cited by NELA (NELA Br. at 17-18 & nn.18-19) thus are inapposite. None involved an adverse-impact challenge to a qualification standard expressly authorized by the ADA.

The Court therefore should reject the suggestion of Hernandez's *amici* to dismiss the writ. There will be no more appropriate case than this one to consider whether no-rehire rules are lawful under the ADA. All of the issues identified in the petition and amplified in petitioner's brief are squarely presented. Dismissing the writ would leave in place the Ninth Circuit's holdings that: (i) the facially nondiscriminatory no-rehire policy that Hughes and thousands of other employers commonly employ is unlawful *per se* when applied to drug addicts who claim to be recovered; (ii) an employer engages in disparate treatment even though its decisionmaker is unaware that the employee is in a category protected by law; (iii) "regarded as" and "record of" plaintiffs are entitled to special treatment, not simply nondiscrimination; (iv) a "second chance" following misconduct is appropriate special treatment; and (v) the employer must make affirmative efforts to broadcast to its human resources staff (at a minimum) the disability status of employees terminated for misconduct (so that those human resources staffers later will be in a position to excuse applicants from the consequences of their misconduct should they reapply). The correct course is to reverse the decision below and wait for another day to review an adverse impact case arising in a context where it perhaps has merit. *Cf. Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (resolving ADEA disparate treatment question while reserving decision on a possible adverse impact issue).

IV. Conclusion

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

RAYTHEON COMPANY, PETITIONER

v.

JOEL HERNANDEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an employer's general policy against rehiring former employees who were discharged for misconduct, when applied to a former drug user who was lawfully discharged for using illegal drugs, constitutes "disparate treatment" prohibited by Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111-12117.

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In the Supreme Court of the United States

No. 02-749

RAYTHEON COMPANY, PETITIONER

v.

JOEL HERNANDEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns whether an employer's general policy against rehiring former employees who were discharged for misconduct, when applied to a former drug user who was lawfully discharged for using illegal drugs, constitutes "disparate treatment" prohibited by Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111-12117. Congress delegated to the Equal Employment Opportunity Commission (EEOC) and Department of Justice authority to promulgate regulations and enforce the provisions of the ADA. Both agencies have promulgated regulations and interpretive guidance concerning the obligations of employers with respect to their current and former

employees who use (or have used) illegal drugs. Moreover, because the Rehabilitation Act makes the standards of Title I of the ADA applicable to the federal government, see 29 U.S.C. 791(g), the United States, as the Nation's largest employer, has a significant interest in the protections afforded to current and former employees who use or have used illegal drugs. See also 29 U.S.C. 793(d) (ADA standards applicable to government contractors); 41 C.F.R. Pt. 60-741.

STATEMENT

1. Title I of the ADA prohibits an employer from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). The Act protects persons who are currently disabled (*i.e.*, those who have a "physical or mental impairment that substantially limits one or more of the[ir] major life activities"), as well as those who have "a record of such an impairment," or who are "regarded as having * * * an impairment" that substantially limits a major life activity. 42 U.S.C. 12102(2).

"Discrimination" can take several forms under the ADA. Most fundamentally, the term encompasses the disparate treatment of individuals with disabilities "because of the disability." 42 U.S.C. 12112(a). Second, it includes so-called "disparate impact" claims, *i.e.*, claims that an employer is "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria * * * is

shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. 12112(b)(6). An employer also may discriminate by failing to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" or by denying employment opportunities to an otherwise-qualified job applicant or employee because of "the need * * * to make reasonable accommodation to [that person's] physical or mental impairment." 42 U.S.C. 12112(b)(5).

The term "qualified individual with a disability" means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment positions that such individual holds or desires." 42 U.S.C. 12111(8). Congress specifically provided that the term does not encompass "any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. 12114(a). In addition, the ADA expressly provides that employers

> may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
>
> may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace; [and]
>
> * * * * *
>
> may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance

or behavior is related to the drug use or alcoholism of such employee.

42 U.S.C. 12114(c)(1)-(2) and (4) (subsection numbering omitted). The ADA does not prohibit employers from testing employees or applicants for illegal drugs "or making employment decisions based on such test results." 42 U.S.C. 12114(d)(2).

The ADA does, however, "provide[] limited protection from discrimination for recovering drug addicts and for alcoholics." EEOC, *Technical Assistance Manual for the Americans With Disabilities Act* VIII-1 (1992). An individual who is no longer engaging in illegal drug use may be a "qualified individual with a disability" if he or she has been successfully rehabilitated or is participating in a supervised rehabilitation program. 42 U.S.C. 12114(b)(1) and (2). An individual also may be considered a "qualified individual with a disability" if he or she "is erroneously regarded as engaging in [illegal drug use], but is not engaging in such use" (42 U.S.C. 12114(b)(3)) and "the employer actually perceives the [drug use] to substantially limit a major life activity of the employee." *Parry* v. *Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 311 (6th Cir. 2000) (collecting authorities), cert. denied, 533 U.S. 951 (2001).

Neither the EEOC nor the Justice Department has issued guidance that specifically addresses the validity under the ADA of applying blanket policies against rehiring employees separated for misconduct to an individual lawfully discharged for drug use.

2. Respondent Joel Hernandez is a former employee of Hughes Missile Systems Company.[1] Pet. App. 2a.

[1] Petitioner Raytheon Company acquired Hughes in 1997. For simplicity, both Hughes and Raytheon will be referred to as "petitioner."

Petitioner came close to terminating respondent in 1986 because of excessive absenteeism. Br. in Opp. 2. When respondent indicated that his absenteeism was caused by his alcoholism, petitioner allowed him to avoid discharge by enrolling in an in-patient alcohol rehabilitation program. *Ibid.*; J.A. 17a.

In July 1991, respondent reported for work displaying signs of substance abuse. J.A. 18a. Petitioner administered a drug test to respondent, who tested positive for cocaine. Pet. App. 2a. Respondent was given a choice between being discharged or resigning in lieu of termination. *Ibid.* Respondent chose to resign. The "Employee Separation Summary" petitioner prepared at the time of respondent's resignation stated that he had "quit in lieu of discharge" and that the reason for his departure was "discharge for personal conduct." *Ibid.*

In January 1994, respondent applied to be rehired by petitioner either in his former position as a Calibration Service Technician or as a Product Test Specialist, a position for which the company had openings. Pet. App. 2a-3a. Respondent noted on his application that he had been employed by petitioner previously. *Id.* at 3a. Respondent also attached to his application a letter from a counselor stating that he regularly attends Alcoholics Anonymous meetings, that he maintains his sobriety, and that he has accepted responsibility for his recovery. J.A. 14a-15a.

Respondent's application was forwarded to petitioner's Labor Relations Department, where it was reviewed by Joanne Bockmiller. Pet. App. 3a. Bockmiller testified in her deposition that she pulled respondent's personnel file and reviewed the employee separation summary. *Ibid.* Bockmiller testified that she concluded respondent was ineligible for rehire based on the com-

pany's unwritten policy against rehiring former employees who were discharged for misconduct or who had resigned in lieu of termination. Pet. App. 4a; J.A. 57a-58a. Bockmiller stated that, at the time, she was unaware that respondent had any history of drug or alcohol abuse and testified that "the personnel file would not indicate that information," which would instead be kept in a separate confidential file. J.A. 55a, 56a-57a, 60a; Pet. App. 4a. Petitioner rejected respondent's application. Pet. App. 3a.

3. In June 1994, respondent filed a charge with the EEOC, claiming that petitioner's refusal to rehire him violated the ADA. In response to respondent's charge, petitioner submitted to the EEOC a statement prepared and signed by a contract employee on behalf of George Medina, petitioner's Manager of Diversity. J.A. 67a-68a; Pet. App. 4a. Bockmiller testified that she did not participate in preparing the statement. J.A. 51a, 64a.

The Medina statement "denied that [petitioner] was discriminated against" and said that respondent's "application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation." J.A. 19a. The statement noted that "[t]he Company maintains it[]s right to deny re-employment to employees terminated for violation of Company rules and regulations" (J.A. 20a), and that respondent was ineligible for hire because he had tested positive for illegal drugs at work and accordingly "was discharged for violation of Company Rule and Regulation No. 7."[2]

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[2] Rule and Regulation 7 prohibits:

> Unauthorized or unlawful manufacture, distribution, dispensing, sale, possession, consumption, use or being under the influence of alcohol, a controlled substance or illegal drug during working time, while performing work for the Company or at any time on Company premises; or testing positive for alcohol or drugs on a test requested by the Company.

J.A. 20a (emphasis omitted).

Ibid. In November 1997, the EEOC District Director issued respondent a determination finding "reasonable cause to believe that [respondent] was denied hire to the position of Product Test Specialist because of his disability." J.A. 95a. The EEOC issued a right to sue letter in June 1998. Pet. App. 4a n.5.

4. Respondent filed suit against petitioner under the ADA in July 1998 (Pet. App. 5a), alleging that petitioner discriminated against him "because of his record of drug addiction or because he was perceived as being a drug addict." *Id.* at 6a. Petitioner moved for summary judgment, arguing that Bockmiller had declined to rehire respondent based solely on petitioner's unwritten policy of not rehiring persons who were discharged for misconduct or who resigned in lieu of termination, and that Bockmiller had acted without knowing of respondent's drug use. *Id.* at 5a. Petitioner also argued that respondent had failed to present evidence that petitioner's reliance on the no-rehire policy was pretextual. *Ibid.*

Respondent argued that petitioner had refused to rehire him because of his record of drug use, and asserted that its reliance on the no-rehire policy was pretextual. C.A. E.R. Tab 7, at 10-12. Respondent also argued that petitioner's unwritten policy of not rehiring employees terminated for misconduct, although "facially neutral," had a "disparate impact" on employees with a history of drug or alcohol abuse. *Id.* at 13-14. Respondent raised no reasonable accommodation claim. See *id.* at 13.

After a hearing, the district court granted petitioner summary judgment without a written opinion. Pet. App. 16a. The district court declined to consider respondent's "disparate impact" claim, finding that respondent had "fail[ed] to plead or raise the theory in a manner consistent with" circuit precedent. *Id.* at 16a n.1.

5. The court of appeals reversed the grant of summary judgment on respondent's disparate treatment claim and remanded, holding that there were genuine issues of material fact about whether petitioner refused to rehire respondent because of his perceived disability or record of disability. Pet. App. 1a-13a. The court first held that respondent had made a prima facie case of disability discrimination, based on petitioner's statement to the EEOC that it had rejected respondent's application "based on his demonstrated drug use." *Id.* at 7a. Although noting that "Bockmiller testified that she did not know of [respondent's] history of drug addiction or of the reason for his leaving the company" (*ibid.*), the court observed that Bockmiller had available respondent's "entire personnel file," which, the court believed, "would have included the 1991 drug test results." *Id.* at 8a. The court also concluded "[i]t would be reasonable to infer from the presence of th[e] letter" respondent appended to his application from his A.A. counselor "that Bockmiller was aware of the fact that [respondent] was a recovering alcoholic." *Ibid.* Accordingly, the court of appeals concluded, "the burden switched to Hughes to offer a legitimate nondiscriminatory reason for its actions." *Id.* at 10a.

The court next rejected petitioner's claim that its "unwritten policy against rehiring former employees who were terminated for any violation of its misconduct rules" was a legitimate non-discriminatory reason for

failing to rehire respondent. Pet. App. 11a. The court concluded that the policy, "although not unlawful on its face, violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction." *Ibid.* Even if Bockmiller were unaware of respondent's past drug use and simply denied his application because of petitioner's general no-rehire policy, "her lack of knowledge would have been due solely to Hughes's unlawful policy which shields its employees from the knowledge that an employment decision may be illegal." *Id.* at 12a. The court concluded (*ibid.*):

> Maintaining a blanket policy against rehire of *all* former employees who violated company policy * * * may well result, as Hughes contends it did here, in the staff member who makes the employment decision remaining unaware of the 'disability' and thus of the fact that she is committing an unlawful act. Having willfully induced ignorance on the part of its employees who make hiring decisions, an employer may not avoid responsibility for its violation of the ADA by seeking to rely on that lack of knowledge.

The court of appeals affirmed the district court's ruling that respondent had failed to properly raise a claim of disparate impact. Pet. App. 13a n.20.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that a company's facially neutral policy against rehiring former employees who have been discharged for violating company conduct rules "violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction." Pet. App. 11a. Such a policy does not constitute "disparate treatment" on the basis of disability, because it applies equally to all former employees discharged for misconduct, regardless of the type of misconduct that was the basis for the discharge, and regardless of whether the former employee suffered a disability. Indeed, the ADA explicitly permits employers to hold drug users and alcoholics to the same standards of conduct as other employees. See 42 U.S.C. 12114(c)(4). Accordingly, the ADA's prohibition on disparate treatment neither forbids discharge for drug use nor forbids adoption of a facially neutral policy against rehiring individuals discharged for misconduct, including drug-related misconduct.

The court of appeals' decision undercuts the effectiveness of workplace conduct rules, which represent a legitimate effort by employers to promote workplace safety and productivity. By preventing firms from adopting blanket rules imposing permanent consequences for serious misconduct, including drug-related misconduct, the court of appeals' decision "indirectly but unmistakably undermine[s] the [rules] that regulate dangerous behavior." *Despears* v. *Milwaukee County*, 63 F.3d 635, 637 (7th Cir. 1995).

Not only must the decision below be reversed, but petitioner is entitled to summary judgment. The evidence in the record, taken in the light most favorable to

respondent, does not demonstrate that petitioner refused to rehire him because of a record of disability or perceived disability, but did so because of its neutral no-rehire policy. Respondent has presented insufficient evidence to support a finding that application of that policy was a pretext for discrimination on the basis of disability.

ARGUMENT

A. Application Of A Facially Neutral Policy Prohibiting The Rehiring Of Former Employees Discharged For Misconduct Does Not Constitute "Disparate Treatment" Prohibited By The ADA

The court of appeals erred in holding that a company's "blanket policy against rehir[ing] of *all* former employees" (Pet. App. 12a) discharged for violating neutral company conduct rules "violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction" (*id.* at 11a)—even if "the staff member who makes the employment decision [is] unaware of the 'disability.'" *Id.* at 12a. That holding conflicts with the text of the ADA, and with broader principles of anti-discrimination law.

1. The most basic feature of the ADA, and the only one at issue here, see p. 17, *infra*, is the Act's prohibition on the "[u]njustified disparate treatment" of otherwise similarly situated individuals because of their disability. *Olmstead* v. *L.C.*, 527 U.S. 581, 607 (1999) (Stevens, J., concurring in part and concurring in the judgment); cf. *Traynor* v. *Turnage*, 485 U.S. 535, 548 (1988) ("the central purpose of § 504 [of the Rehabilitation Act] * * * is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals"). An employer's neutral

policy against rehiring former employees who were discharged for violating conduct rules (or who resigned in lieu of discharge) does not facially conflict with the ADA's prohibition on disparate treatment of the disabled.[3]

To begin with, such a policy does not involve "treat[ing] some people less favorably than others" because of a protected characteristic. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 609 (1993) (quoting *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 n.16 (1977)); accord 2 EEOC Compl. Man. (BNA) 604:0001 (2002). Rather, as the court of appeals itself recognized, such facially neutral policies involve a "blanket [prohibition] against rehir[ing] of *all* former employees" terminated for misconduct. Pet. App. 12a. Such a policy applies on an equal basis to all employees regardless of the type of misconduct that was the basis for their discharge—whether it was for fighting, sexual harassment, theft, or (as here) testing positive for illegal drugs during work hours. Similarly, rules against testing positive for illegal drugs or being drunk in the workplace apply regardless of whether the employee is addicted or is merely a casual user, an alcoholic or a social drinker.

Moreover, the ADA textually permits employers to hold drug addicts and alcoholics to the same standards

[3] The court of appeals proceeded on the understanding that petitioner's no-rehire policy extended both to employees discharged for misconduct and those who resigned in lieu of discharge for misconduct. See, *e.g.*, Pet. App. 4a n.4 ("for the purposes here—the rehiring of former employees—there appears to be no difference in Hughes's treatment of employees who were terminated as opposed to those who resigned under threat of termination"); *id.* at 12a n.17 ("There is no question that Hughes applied this [no-rehire] policy in rejecting Hernandez's application.").

as other employees: employers "may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that [it] holds other employees, even if the unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." 42 U.S.C. 12114(c)(4); see 29 C.F.R. 1630.16(b)(4). Thus, if a company ordinarily fires employees for excessive absenteeism or coming to work under the influence of drugs or alcohol, it may do the same when the employee is an alcoholic or addicted to drugs. "It is well-established that an employee can be terminated for violations of valid work rules that apply to all employees, even if the employee's violations occurred under the influence of a disability. This rule is particularly applicable to employees who violate rules relating to drug or alcohol abuse." *Pernice* v. *City of Chicago*, 237 F.3d 783, 785 (7th Cir. 2001) (citation omitted). "The refusal to excuse, or even alleviate the punishment of, the disabled person who commits [misconduct] under the influence as it were of his disability * * * is not 'discrimination' against the disabled; it is a refusal to discriminate in their favor." *Despears* v. *Milwaukee County*, 63 F.3d 635, 637 (7th Cir. 1995).[4]

[4] Accord, *e.g.*, *Technical Assistance Manual for the Americans With Disabilities Act* VIII-5 (1992) ("[u]nsatisfactory behavior such as absenteeism, tardiness, poor job performance, or accidents caused by alcohol or illegal drug use need not be accepted or accommodated"); 2 EEOC Compl. Man. (BNA) 902:0006 n.11 (employer "does not have to excuse [employee] misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees"); 1 EEOC Compl. Man. (BNA) 0:3806 (same); *Salley* v. *Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3d Cir. 1998) ("drug-related misconduct is a legitimate, non-discriminatory rea-

By the same token, if the company ordinarily bars former employees terminated under such circumstances from being rehired, it may apply the same standard to former employees who are recovering alcoholics or drug addicts. See, *e.g.*, *Harris* v. *Polk County*, 103 F.3d 696, 697 (8th Cir. 1996) (concluding that ADA permits employer's refusal to rehire former employee discharged because of criminal conviction allegedly related to mental illness, because "an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees"). Employment actions taken pursuant to such a facially neutral policy do not represent action taken "because of the disability of [an] individual." 42 U.S.C. 12112(a).

In a disparate treatment case, "liability depends on whether the protected trait * * * *actually motivated* the employer's decision * * * and had a *determinative influence* on the outcome." *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (quoting *Hazen Paper*, 507 U.S. at 610) (emphasis added); see

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son for termination" of a drug addict); *Mararri* v. *WCI Steel, Inc.*, 130 F.3d 1180, 1182 (6th Cir. 1997) (discharge for testing positive for alcohol at work in violation of agreement with employer was lawful under the ADA because employee was "discharged * * * for violating the agreement, not for being an alcoholic"). The Rehabilitation Act—which Congress used as a model in drafting the ADA, see *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998)—also permits employers to make employment decisions based on alcohol- and drug-related misconduct. See *Newland* v. *Dalton*, 81 F.3d 904, 906 (9th Cir. 1996); *Leary* v. *Dalton*, 58 F.3d 748, 753 (1st Cir. 1995); *Little* v. *FBI*, 1 F.3d 255, 259 (4th Cir. 1993); 43 Op. Att'y Gen. 75, 86 (1977) ("we do not believe that section 504 [of the Rehabilitation Act] would prevent [an alcoholic or drug-addicted employee] from being subject to reasonable, generally applicable rules of conduct that are related to this condition, such as proscriptions against the possession or use of drugs or alcohol").

Personnel Adm'r v. *Feeney*, 442 U.S. 256, 279 (1979) (action must be taken "*because of* * * * its adverse effects upon an identifiable [protected] group") (emphasis added). Accordingly, this Court has held that it does not constitute discrimination to make an employment decision based on a factor that is "correlated with" a protected characteristic, so long as there is an analytical distinction between the two.

In *Hazen Paper*, for example, the Court held that terminating an employee because his pension was about to vest, although prohibited under ERISA, did not violate the Age Discrimination in Employment Act of 1967. The Court noted that while entitlement to pension benefits is "correlated with age" (507 U.S. at 611) because "older employees * * * are more likely to be 'close to vesting' than younger employees" (*id.* at 612), an employee's age was nonetheless "analytically distinct from his years of service." *Id.* at 611. Accordingly, the Court concluded, "it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Ibid.*; cf. *Feeney*, 442 U.S. at 271, 279-280 (holding that facially neutral hiring preference for veterans did not constitute unconstitutional intentional sex discrimination, although a "substantially greater proportion" of beneficiaries were men).

While addiction to illegal drugs, use of illegal drugs, and drug-related misconduct are correlated, they nonetheless are analytically distinct. Many people who test positive for illegal drugs in the workplace are casual drug users rather than addicts, and many recovering addicts refrain from illegal drug use. Thus, termination for a positive drug test—and refusal to rehire a person terminated for drug-related misconduct—do not represent prohibited discrimination "because of the disability of [an] individual." 42 U.S.C. 12112(a). The courts of

appeals have recognized that fact by consistently drawing a "distinction between discharging someone for unacceptable [drug- or alcohol-related] misconduct and discharging someone because of" drug addiction or alcoholism. *Maddox* v. *University of Tenn.*, 62 F.3d 843, 847 (6th Cir. 1995) (collecting authorities); accord *Renaud* v. *Wyoming Dep't of Family Servs.*, 203 F.3d 723, 730 (10th Cir. 2000) (noting that "where the disability at issue is alcoholism, * * * the ADA recognize[s] a dichotomy between the disability and disability-caused misconduct" such as being intoxicated at work); *Nielsen* v. *Moroni Feed Co.*, 162 F.3d 604, 609 (10th Cir. 1998) (the ADA "clearly contemplate[s]" this distinction).

Furthermore, when the decision not to rehire a person reflects the application of a blanket policy against rehiring former employees who were discharged for misconduct—even when the reason for discharge was drug use, and the person was an addict at the time—it does not implicate the "primary purpose" of the ADA, which is to "eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in * * * the workplace." *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401 (2002); cf. *Olmstead*, 527 U.S. at 600. See generally 42 U.S.C. 12101(a)(7). Rather, it results from the person's individual merit, as demonstrated by his or her conformance with company rules of conduct. Accordingly, policies against rehiring former employees who were discharged for misconduct (or who resigned in lieu of termination) are not inconsistent with the ADA's prohibition on disparate treatment of the disabled.

2. This is not to say that a policy that prohibited the rehiring of employees discharged for misconduct could not give rise to liability under the ADA. However, such a policy would be properly analyzed as a disparate impact claim under 42 U.S.C. 12112(b)(6), rather than as a disparate treatment claim. For example, a policy that barred *only* persons discharged for drug use from consideration for rehiring might be challenged as having a disparate impact on individuals with the disability of addiction. Such a disparate impact challenge must account for the ADA's express provision that employers "may hold an employee who engages in the illegal use of drugs * * * to the same qualification standards for employment or job performance and behavior that [it] holds other employees, even if the unsatisfactory performance or behavior is related to drug use." 42 U.S.C. 12114(c)(4). Accordingly, a disparate impact challenge to a neutral policy, like the one at issue here that precludes the rehiring of any employee who was discharged for any form of serious misconduct, would be more difficult to sustain.

Respondent has not preserved a disparate impact claim here.[5] Accordingly, this case presents a situation analogous to the one this Court confronted in *Hazen Paper*. There, the Court carefully distinguished beween disparate treatment and disparate impact claims, 507 U.S. at 609, noted that the employee brought only the former, *id.* at 610, and concluded that a decision that is based on a factor other than age, even if correlated with age, does not constitute forbidden disparate treat-

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[5] Both the district court (Pet. App. 16a n.1) and court of appeals concluded that respondent had "failed to timely raise [a] claim of disparate impact" (*id.* at 13a n.20), and respondent did not cross-petition to seek review of that holding. Accordingly, the claim is not before the Court. *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 92 n.2 (1978) (per curiam); *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 279 n.2 (1976).

ment. *Id.* at 611. In the same way, to the extent reliance on the no-rehiring policy was not pretextual, see pp. 23-25, *infra*, a decision based on that policy does not constitute disparate treatment forbidden by the ADA.

B. The Court Of Appeals' Holding Will Disrupt Legitimate Workplace Rules Designed To Promote Safety And Productivity

Workplace conduct policies advance three important interests: they help fulfill the employer's duty, imposed under the common law and the law of many states, to "exercise reasonable care in providing a safe workplace" (*International Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. 851, 859 (1987); Ralph G. Wellington & Vance G. Camisa, *Trade Association and Product Safety Standards: of Good Samaritans and Liability*, 35 Wayne L. Rev. 37, 51 & n.84 (1988)); they promote company productivity, by helping to control a variety of inappropriate workplace conduct, such as insubordination, sexual harassment, absenteeism, theft, drug or alcohol abuse, and violence; and they help to limit a company's legal liability by establishing standards for employee behavior and disciplining or discharging those who do not comply. Workplace conduct policies that include prohibitions on reporting for work under the influence of alcohol or drugs may further all three interests.[6] It is no surprise, then, that most companies'

[6] See, *e.g.*, M.L. Holcom et al., *Employee Accidents: Influences of Personal Characteristics, Job Characteristics, and Substance Use in Jobs Differing in Accident Potential*, 24 J. of Safety Res. 205 (1993) (drug and alcohol use correlated with increased accident rate for high-risk jobs); Tyler D. Hartwell et al., *Workplace alcohol-testing programs: prevalence and trends*, Monthly Labor Rev., June 1998, at 27 n.6 (*available at* http://www.bls.gov/opub/mlr/1998/06/art4full.pdf) (drug use associated with industrial accidents); Office of Applied Studies, Dep't of Health & Human Servs., *Worker Drug Use and Workplace Policies and Programs: Results from the 1994 and 1997 National Household Survey on Drug Abuse*, Ch. 3 (2002) (*available at* http://www.samhsa.gov/oas/nhsda/A-11/WrkplcPlcy2-22.htm) (drug use correlated with absenteeism and excessive turnover); Jacques Normand et al., *An Evaluation of Preemployment Drug Testing*, 75 J. Applied Psychol. 629, 636-637 (1990) (reducing drug use by employees could save millions of dollars through increased productivity).

workplace conduct rules contain provisions addressing drug and alcohol use.

For maximum effectiveness, workplace rules must be tailored to the particular needs and culture of a particular company. Cf. United States Dep't of Labor, *What Works: Workplaces Without Alcohol and Other Drugs* v (1994) (*What Works*) (*available at* http://said.dol.gov/SAID_Attachments/553said1.pdf). Although the government encourages employers to create employee assistance programs to deal with a range of workplace problems and specifically to help rehabilitate employees who abuse drugs or alcohol, the federal government specifically has recognized that businesses may legitimately decide to terminate employees who test positive for drug use. See EEOC, *Technical Assistance Manual for the Americans With Disabilities Act* VIII-5 (1992); see also 14A Employ. Coordinator (RIA) ¶ PM-16,104 (2003) ("reporting to work under the influence of alcohol, narcotics, or other [illegal] drugs" is "almost always viewed as grounds for automatic discharge" and "virtually all employers consider [it] to be serious enough to merit immediate dismissal").

Similarly, companies may legitimately conclude that misconduct that warrants discharge—whether related to illegal drug use or not—should bar employees from subsequent employment with the company. Cf. *What*

Works 23 (*available at* http://said.dol.gov/SAID_Attachments/553said5.pdf) (setting forth model corporate drug policy featuring bar on rehiring of employees terminated for drug use). Such a policy has definite advantages. First, it gives employees clear notice that some misconduct is so serious that it will not be tolerated. Cf. 14A Employ. Coordinator (RIA) ¶ PM-16,103 (2003) (discussing automatic discharge policies). Second, and relatedly, it operates as a strong deterrent to covered misconduct, which is a particularly important consideration for employees in sensitive or high-risk positions. Third, the clarity of the rule makes it simple to administer and prevents accidental rehiring when persons making hiring decisions lack access to former employees' full records. Finally, it furthers former employees' privacy interests, because there is no need for the employer to keep detailed records of the nature of employee misconduct.

The court of appeals' rule undermines the effectiveness of workplace conduct rules and limits on the rehiring of discharged employees. By creating an exemption to blanket policies prohibiting the rehiring of employees discharged for serious misconduct for "former drug addicts whose only work-related offense was testing positive because of their addiction" (Pet. App. 11a), the court below undermined the certainty and evenhandedness of such policies. By reading the ADA's prohibition on disparate treatment of the disabled to exempt recovering drug addicts and alcoholics from otherwise generally applicable workplace rules prescribing the consequences for misconduct, the court of appeals' rule conflicts with Congress's judgment that the ADA should not provide special preferences to those who use drugs or alcohol in the workplace. See, *e.g.*, 42 U.S.C. 12114(c). Equally important, such a rule

"indirectly but unmistakably undermine[s] the [rules] that regulate dangerous behavior." *Despears*, 63 F.3d at 637.

C. Petitioner Is Entitled To Summary Judgment

For these reasons, the court of appeals clearly applied an erroneous legal standard and the judgment below should be reversed. It also appears that under the proper legal standard, summary judgment for petitioner is appropriate.

Summary judgment is proper if "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). Petitioner is entitled to summary judgment here because the evidence in the record, taken in the light most favorable to respondent, does not demonstrate that petitioner refused to rehire respondent because of his record of disability or perceived disability, but rather did so based on the neutral application of its no-rehire policy.[7]

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[7] Although this Court has never addressed the issue, the courts of appeals have applied the familiar burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), to analyze disparate treatment claims under the ADA. See, *e.g.*, *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999); *Helfter* v. *United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997); cf. *Reeves*, 530 U.S. at 142 ("assum[ing], *arguendo*, that the *McDonnell Douglas* framework" applies to ADEA actions). Under the *McDonnell Douglas* framework, once a plaintiff has established a prima facie case of discrimination, the burden of going forward with evidence shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse employment action. 411 U.S. at 802. If the employer presents evidence of a nondiscriminatory reason for its action, the plaintiff may then show that the employer's proffered explanation is not the

Petitioner presented the testimony of Joanne Bockmiller, who testified that she reviewed respondent's application and made the determination not to rehire him. Pet. App. 3a. Bockmiller testified that she pulled respondent's personnel file and reviewed the employee separation summary from his prior employment, and concluded respondent was ineligible for rehire because petitioner has an unwritten policy against rehiring its former employees who were discharged for misconduct or who resigned in lieu of termination. Pet. App. 4a; J.A. 57a-62a. Bockmiller stated that, at the time, she was "not aware" that respondent had any history of drug or alcohol abuse and—contrary to the court of appeals' assumption (Pet. App. 8a)—"the personnel file would not indicate that information." J.A. 55a; accord J.A. 56a, 60a; see also 88a-91a (information would be in medical file). Bockmiller stated that she did not "determine the specific reason as to why Mr. Hernandez was terminated" (J.A. 56a), but that respondent was treated "the same as we would anyone else who had been terminated or quit in lieu of discharge and was not eligible for rehire." J.A. 59a.

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true reason for the employment decision, but was "in fact a coverup for a * * * discriminatory decision." *Id.* at 805. The burden of persuasion remains with the plaintiff at all times. *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 511 (1993). This Court need not determine whether respondent has presented a prima facie case of discrimination, because even if he did, petitioner is entitled to summary judgment because respondent has failed to present evidence that petitioner's no-rehire policy was pretextual. Cf. *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983) ("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.").

Noting that petitioner's response to the EEOC complaint states that "Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation," respondent contends that the policy "was misused by Hughes as a pretext for discriminating against [him] based on his record of alcohol and drug addiction." Br. in Opp. 13. That letter is insufficient to prevent summary judgment. The undisputed evidence indicates that Bockmiller alone made the decision not to rehire respondent, and she was not involved, years later, in writing the letter to the EEOC. J.A. 50a-51a, 64a, 74a, 78a. Nor was the person in whose name the EEOC response was signed, George Medina, involved in the decision not to rehire respondent. J.A. 62a. "Because [Bockmiller] was the relevant decision-maker, [Medina's] somewhat inconsistent statement as to the factors he *believed [Bockmiller] considered* is simply not probative of pretext, particularly where * * * there is no evidence to discredit [Bockmiller's] explanation of [why] [s]he decided" not to rehire respondent. *Rowe* v. *Marley Co.*, 233 F.3d 825, 831 (4th Cir. 2000); accord *Krchnavy* v. *Limagrain Genetics Corp.*, 294 F.3d 871, 876-877 (7th Cir. 2002); *Chiaramonte* v. *Fashion Bed Group, Inc.*, 129 F.3d 391, 402 (7th Cir. 1997), cert. denied, 523 U.S. 1118 (1998).

Moreover, petitioner's response to the EEOC is not inconsistent with Bockmiller's testimony that she rejected respondent's application based on the no-rehire policy without knowing the nature of his misconduct. The EEOC response specifically mentions the no-rehire policy and the discussion of respondent's prior drug use is fairly read to explain what misconduct triggered application of the policy. See J.A. 20a; J.A.

73a (Medina stated, "essentially we argued that, hey, he violated company policy and we just don't bring back people who [do that]"). Moreover, the letter does not indicate that respondent was "regarded as" (42 U.S.C. 12102(2)) a disabled *addict*, merely that he had engaged in "drug use." J.A. 19a. See generally *Salley* v. *Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3d Cir. 1998) (employer's awareness of drug use "is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action"); *Parry* v. *Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 311 (6th Cir. 2000); *Nielsen*, 162 F.3d at 610.

Respondent has offered no evidence of any instances in which petitioner permitted reapplication by a former employee discharged for non-drug-related misconduct (or for drug-related conduct by a non-addict), nor has he proffered any other evidence to suggest the no-rehire policy was a pretext for discrimination.[8] The uncontradicted evidence in the record indicates that petitioner applied its no-rehire policy uniformly. See J.A. 57a-59a, 72a, 80a. Under the circumstances, respondent

[8] Cf. *Salley*, 160 F.3d at 981 (summary judgment appropriate where plaintiff "has offered no evidence to suggest that drug policy violations were tolerated for non-addicts but used to justify firing addicts"); *Collings* v. *Longview Fibre Co.*, 63 F.3d 828, 834 (9th Cir. 1995) ("There is no indication that [plaintiffs] were treated differently from other employees who engaged in similar conduct. Therefore, they have not produced sufficiently specific facts of pretext to avoid summary judgment."), cert. denied, 516 U.S. 1048 (1996); *Maddox*, 62 F.3d at 848 ("There is no evidence in the record establishing that [employers] * * * failed to reprimand or terminate any [other employee] who they knew to have engaged in [similar] behavior.").

cannot carry his burden of proving causation and summary judgment is appropriate.

Moreover, the unrefuted evidence indicates that Bockmiller was unaware of respondent's past drug use when she made her decision. See J.A. 54a-56a, 60a. An employer cannot be said to have engaged in disparate treatment "because of" an individual's disability (42 U.S.C. 12112(a)) if it was unaware of the disability.[9] Cf. *Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 273 (2001) (per curiam) (retaliation claim cannot be made under Title VII where "there is no indication that [the employer] even knew" the plaintiff had engaged in protected activity). Thus, the court of appeals plainly erred by holding that a disparate treatment claim could be made even when "the staff member who makes the employment decision [is] unaware of the 'disability.'" Pet. App. 12a.

The court of appeals concluded (Pet. App. 8a) that because Bockmiller *had access to* respondent's personnel file, and because respondent attached to his application a letter from his A.A. counselor indicating he was a recovering alcoholic, one could infer, contrary to Bockmiller's sworn testimony, that "she would have checked the personnel file to determine the reason for his earlier termination." Pet. App. 8a. Even assuming such speculation were warranted, it is insufficient to create a material issue of fact about whether the decisionmaker was aware of respondent's disability.

[9] See, *e.g.*, *Taylor* v. *Principal Fin. Group*, 93 F.3d 155, 163 (5th Cir.) ("To prove discrimination, an employee must show that the employer knew of such employee's substantial physical or mental limitation."), cert. denied, 519 U.S. 1029 (1996); *Geraci* v. *Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996); *Hedberg* v. *Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995).

Bockmiller testified that the results of respondent's 1991 drug test would not have been in the personnel file she pulled (and that in any event, she did not determine the reason for his discharge). J.A. 55a-56a. That testimony was consistent with Medina's testimony. See J.A. 88a-91a. A finding that Bockmiller knew of the results of the drug test would require speculation that uncontradicted testimony was false. This Court, however, has held that summary judgment may not be avoided "by merely asserting that the jury might * * * disbelieve the defendant's [testimony]." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1985).

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

RAYTHEON COMPANY, ET AL.,
Petitioners,

v.

JOEL HERNANDEZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS AND IN SUPPORT OF REVERSAL

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31PP

QUESTION PRESENTED

Whether the Americans with Disabilities Act confers preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use.

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS AND IN SUPPORT OF REVERSAL

The Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully submit this brief *amici curiae*. The brief supports reversal of the decision below and thus supports the position of Petitioner Raytheon Company, *et al.*[1]

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes approximately 340 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of nearly three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's member companies and many of the Chamber's members are employers subject to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities.

EEAC's and the Chamber's members include chemical and other manufacturing companies, oil refineries, airlines, pharmaceutical manufacturers, railroads, health care providers, nuclear power companies, defense contractors, and many others. Many if not all of these companies have adopted standards governing the conduct of employees in the workplace, including rules prohibiting the use of, or being under the influence of, illegal drugs and alcohol on the job. These rules are grounded in such legitimate business considerations as the need to prevent workers from killing or injuring themselves, coworkers or members of the public due to the deleterious effects of drugs or alcohol. For many of these companies, an employee's rule infraction that is severe enough to warrant termination also makes the offender ineligible for rehire at a later date.

Thus, EEAC's and the Chamber's members will be directly affected by the Court's decision in this case. The court below concluded that an employer's policy against rehiring former employees who were terminated for violating a company conduct rule, as applied to an individual terminated for illegal drug use, violates the ADA as a matter of law. It thus creates an automatic "back door" for former employees to whom the front door is barred due to their violation of a company rule.

The decision below turns disability discrimination law upside down, making it a shield behind which anyone who claims "my disability made me do it" can hide from accountability for his or her actions. It rewards drug abuse by creating a preference for rehire in favor of those who were legitimately terminated for using drugs on the job. Moreover, it confers potential ADA protection on any employee who is terminated for criminal actions such as violence towards a coworker, theft of company property or funds, and the like.

EEAC's and the Chamber's experience with the issues before the Court extends well beyond the context of the instant case. Thus, this brief brings to the attention of the Court relevant matter not already brought to its attention by the parties.

STATEMENT OF THE CASE

Joel Hernandez was a Calibration Service Technician for Hughes Missile Systems Company [2] when he tested positive for cocaine in a July 1991 drug test. Pet. App. 2a. The company gave him the option of resigning in lieu of termination, and he did. *Id.*

In January 1994, Hernandez again applied for a job at Hughes. *Id.* The company rejected his application because his record indicated that he was ineligible for rehire due to personal misconduct, *i.e.*, violation of a company policy that mandated termination or resignation in lieu of termination. Pet. App. 4a. Hernandez subsequently filed a charge with the Equal Employment Opportunity Commission, contending that Hughes discriminated against him in violation of Title I of the Americans with Disabilities Act, 42 U.S.C. § 12111–12117, on the basis of his having a record of a drug addiction. *Id.* When he subsequently sued Hughes on the same grounds, the trial court granted summary judgment in favor of Hughes. Pet. App. 16a–17a. Hernandez appealed.

The Ninth Circuit reversed, holding that Hughes' policy against rehiring any former employee terminated for violating a conduct rule violates the ADA because it "serves to bar the re-employment of a drug addict despite his successful rehabilitation." Pet. App. 11a. The Court rejected Hughes' argument that the policy is nondiscriminatory because it does not single out employees with a record of drug addiction or treat them any differently from other employees fired for using drugs or for violating other conduct rules that require termination and a bar from rehire, such as rules against fighting or

[2] Hughes Missile Systems Company has since been acquired by Raytheon Company. Pet. App. 1. Since the relevant events occurred prior to the acquisition, we will refer to Petitioners collectively as "Hughes" or "the company."

stealing. Pet. App. 10a–11a. Hughes sought and was granted this Court's review of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, does not prevent an employer from enforcing legitimate rules governing workplace conduct, nor does it preclude disciplinary action, such as termination and refusal to rehire, as a consequence of violating such rules. While the ADA prohibits employment discrimination on the basis of disability, it permits a clear distinction between disability discrimination, which is prohibited, and enforcement of legitimate conduct rules, such as those barring workplace substance abuse, which is not. *E.g., Pernice v. City of Chicago*, 237 F.3d 783, 785 (7th Cir. 2001); *Martin v. Barnesville Exempted Village Sch. Dist. Bd. of Educ.*, 209 F.3d 931, 934 (6th Cir. 2000); *Renaud v. Wyoming Dep't of Family Servs.*, 203 F.3d 723, 730 (10th Cir. 2000); *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998). Indeed, the ADA explicitly authorizes employers to enforce rules against drug and alcohol use, even if the user is a drug addict or alcoholic who may be a protected "individual with a disability" under the law. 42 U.S.C. § 12114(c). The rationale underlying these principles is that the ADA does not excuse conduct by an individual with a disability that would not be tolerated in an individual without a disability. EEOC Compl. Man. (BNA) § 902.2 n.11 (Nov. 2002).

For the same reasons, applying a rule that makes a former employee "ineligible for rehire" if he or she was terminated for violating a workplace conduct rule likewise does not violate the law. In both cases, the reason for the action is the conduct—violation of the work rule—rather than any underlying explanation or excuse for the conduct. *E.g., Harris v. Polk County*, Iowa, 103 F.3d 696, 697 (8th Cir. 1996).

Employers establish workplace conduct rules for a variety of legitimate reasons, including safety, productivity, and legal requirements. When a conduct violation warrants an employee's termination, many employers have elected also to consider that employee as ineligible for rehire, thus strengthening the force and effect of their conduct rules. This practice is particularly common when the infraction involves illicit drug abuse in the workplace. Because the decision below provides an automatic "second chance" for anyone terminated for misconduct if they can claim the misconduct stemmed from a disability, it should be reversed.

ARGUMENT

I. AN EMPLOYER'S APPLICATION OF ITS "INELIGIBLE FOR REHIRE" POLICY TO A FORMER EMPLOYEE TERMINATED FOR VIOLATING A WORKPLACE CONDUCT RULE SUCH AS A PROHIBITION ON DRUG USE DOES NOT VIOLATE THE AMERICANS WITH DISABILITIES ACT

A. The ADA Does Not Shield Employees Who Violate Company Conduct Rules From the Consequences of Their Actions

1. Employers May Enforce Rules Against Drug and Alcohol Use and Other Workplace Misconduct, Even if the Misconduct Is Traceable to a Disability

Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117, prohibits discrimination in employment against a "qualified individual with a disability" on the basis of a disability. 42 U.S.C. § 12112(a). It does not shelter employees or former employees from the consequences of their misconduct, regardless of whether their wrongdoing may be somehow connected to a disability.

Accordingly, employers are well within their rights to take disciplinary action against an employee who violates a workplace conduct rule, whether or not the conduct may have something to do with a disability.

Indeed, the ADA explicitly provides that an employer may forbid all employees from using or being under the influence of illegal drugs or alcohol in the workplace. 42 U.S.C. § 12114(c)(1) and (2). It specifically allows employers to hold employees to the standards established by the Drug-Free Workplace Act of 1988 [3], 42 U.S.C. § 12114(c)(3), which requires federal contractors to commit to take various steps to prevent workplace drug use, including notifying employees of the employer's policy against workplace drug use and taking disciplinary action for violating the policy. 41 U.S.C. § 701(a). Moreover, the ADA unambiguously permits employers to enforce its rules against substance abuse, stating that an employer:

> may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee . . . .

42 U.S.C. § 12114(c)(4). Accordingly, the ADA confirms an employer's right to discipline an employee for substance abuse, even though the employee may have a disability due to drug abuse or alcoholism. Thus, when Hernandez came to work at Hughes with illegal drugs in his system, he violated a company rule of conduct for which the ADA expressly permits employers to take disciplinary action, even if Hernandez was a drug addict at the time.

As does the statute, the circuit courts of appeals also have acknowledged the fundamental distinction between a

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[3] 41 U.S.C. §§ 701 *et seq.*

disability itself and conduct that allegedly is caused by a disability. Recognizing that the ADA prohibits discrimination "because of" a disability, 42 U.S.C. § 12112(a), these courts have explained that where an employer takes disciplinary action against an employee for workplace misconduct that may be related to a disability, the decision is still "because of" the conduct, not the disability, and therefore does not violate the ADA.

The Seventh Circuit explained this distinction in *Pernice v. City of Chicago*, 237 F.3d 783 (7th Cir. 2001). The City fired Pernice, a 20-year City employee, after he was arrested and charged with disorderly conduct and possession of cocaine. Pernice sued the City under the ADA, claiming that he had been discharged due to his disability of drug addiction, since his drug possession was 'an integral part' of his disability. *Id.* at 784. The Seventh Circuit, upholding the trial court's dismissal of the complaint, observed that "[i]t is well-established that an employee can be terminated for violations of valid work rules that apply to all employees, even if the employee's violations occurred under the influence of a disability. This rule is particularly applicable to employees who violate rules relating to drug or alcohol abuse." *Id.* at 785 (citation omitted).

In so doing, the Seventh Circuit rejected Pernice's argument that the ADA protected him because his disability—drug addiction—caused his actions, stating that "Pernice made a conscious choice to actually possess drugs. We therefore have little trouble separating his misconduct from his alleged disability." *Id.* at 787.

Courts have reached the same conclusion with respect to workplace rules against alcohol abuse. In *Martin v. Barnesville Exempted Village School District Board of Education*, 209 F.3d 931, 934 (6th Cir. 2000), the Sixth Circuit concluded that even if the school district "regarded" the plaintiff as an alcoholic, it had a legitimate, nondiscrimina-

tory reason for refusing to place him in a bus driver position after he was caught drinking on the job. Similarly, in *Renaud v. Wyoming Department of Family Services*, 203 F.3d 723, 730 (10th Cir. 2000), the Tenth Circuit rejected an ADA claim challenging the dismissal, pursuant to the employer's substance abuse policy, of a school superintendent who came to work drunk, stating that "ADA protection . . . does not extend to an alcoholic's use of alcohol on the job."

This interpretation dates back to the Rehabilitation Act of 1973, the predecessor to the ADA. In *Little v. F.B.I.*, 1 F.3d 255, 258 (4th Cir. 1993), the Fourth Circuit noted that cases applying the Rehabilitation Act "have considered the issue of misconduct as distinct from status as an alcoholic or drug addict."[4] The First Circuit concluded that a civilian Navy employee who was fired after being jailed for driving while intoxicated was discharged for his unauthorized absence, not his alcoholism. *Leary v. Dalton*, 58 F.3d 748 (1st Cir. 1995). When the University of Tennessee fired an assistant football coach after his arrest for driving under the influence of alcohol and public intoxication, the Sixth Circuit concluded that "the district court correctly focused on the distinction between discharging someone for unacceptable misconduct and discharging someone because of the disability." *Maddox v. University of Tennessee*, 62 F.3d 843, 847 (6th Cir. 1995).

The reasoning underlying all of these decisions is that neither the ADA nor the Rehabilitation Act excuses conduct by an individual with a disability that would not be tolerated in an individual without a disability. As the Tenth Circuit has

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[4] The Fourth Circuit also related the development of the regulations interpreting the Rehabilitation Act, and particularly the question of whether an alcoholic or drug addict was covered by the Act at all. When the Secretary of Health, Education and Welfare asked the opinion of the Attorney General, he concluded that both were protected by the law, but "he made clear that the Act does not protect alcoholics or drug addicts from the consequences of their misconduct." *Little*, 1 F.3d at 258.

said, "We cannot adopt an interpretation of the statute which would require an employer to accept egregious behavior by an alcoholic employee when that same behavior, exhibited by a nondisabled employee, would require termination." *Williams v. Widnall*, 79 F.3d 1003, 1007 (10th Cir. 1996). The Sixth Circuit explained that "to hold otherwise, an employer would be forced to accommodate all behavior of an alcoholic which could in any way be related to the alcoholic's use of intoxicating beverages; behavior that would be intolerable if engaged in by a sober employee or, for that matter, an intoxicated but non-alcoholic employee." *Maddox*, 62 F.3d at 847. Indeed, the Seventh Circuit has envisioned the potentially harmful consequences of a contrary holding:

> To impose liability under the Americans with Disabilities Act or the Rehabilitation Act in such circumstances would indirectly but unmistakably undermine the laws that regulate dangerous behavior. It would give alcoholics and other diseased or disabled persons a privilege to avoid some of the normal sanctions for criminal activity. It would say to an alcoholic: We know it is more difficult for you to avoid committing the crime of drunk driving than it is for healthy people, and therefore we will lighten the sanction by letting you keep your job in circumstances where anyone else who engaged in the same criminal behavior would lose it.

Despears v. Milwaukee County, 63 F.3d 635, 637 (7th Cir. 1995).

The same analysis applies to conduct violations by individuals with other disabilities as well. In *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998), the Fifth Circuit held that an employee's violation of the company's workplace violence policy constituted a legitimate, nondiscriminatory business reason for his termination, even if his conduct was caused by post-traumatic stress disorder, noting that "[t]he cause of Hamilton's discharge was not discrimination based on PTSD but was

rather his failure to recognize the acceptable limits of behavior in a workplace environment"). Similarly, the Seventh Circuit ruled that an employer terminated an employee because she threatened to kill a coworker and not because of her mental illness, noting that "if an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act." *Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997) (citations omitted). As the First Circuit said recently, "Put simply, the ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems from a mental disability. Such an employee is not qualified." *Calef v. Gillette Co.*, 322 F.3d 75, 87 (1st Cir. 2003) (footnote omitted).

Nor have the courts limited this analysis to incidents of workplace violence or threats of violence. Falling asleep on the job violates another common conduct rule, and can be related to a medical condition, yet employers need not overlook the infraction. The Sixth Circuit has concluded that a hospital that terminated an anesthesiologist with sleep apnea who repeatedly dozed off on the job did not violate the ADA, noting that there was no evidence that the hospital had treated him any differently than it would have "a physician who slept on the job for another reason, such as staying up late every night to watch television." *Brohm v. JH Properties, Inc.*, 149 F.3d 517, 522 (6th Cir. 1998). In *Hill v. Kansas City Area Transportation Authority*, 181 F.3d 891, 894 (8th Cir. 1999), the Eighth Circuit concluded that where an employee waited until after she twice fell asleep on the job, "a work rule violation she knew would mandate her discharge," before requesting accommodation, the ADA did not require her employer to grant her another chance to better control her own treatable condition. *See also Leonberger v. Martin Marietta Materials, Inc.*, 231 F.3d 396 (7th Cir. 2000)

(employer who terminated a front loader driver with sleep apnea for sleeping on the job did not violate the ADA).

Indeed, as the Fourth Circuit has said, "[t]he law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability." *Jones v. American Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999) (holding that employer did not violate the ADA by terminating an employee who threatened his supervisor's life).[5]

Even the Ninth Circuit repeatedly has recognized the dichotomy between a disability and workplace misconduct. *See Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 (9th Cir. 1995) (noting that "[c]ourts have recognized a distinction between termination of employment because of misconduct and termination of employment because of a disability," and applying that distinction to hold that the termination of employees for using or being under the influence of drugs in the workplace did not violate the ADA). *See also Brown v.*

[5] Two circuits have suggested that because the ADA explicitly permits employers to hold substance abusers to the same qualification standards as other workers, but says nothing about other disability-related conduct, the rule establishing a dichotomy between conduct and disability applies only to situations involving substance abuse. *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1086 (10th Cir. 1997); *Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3d Cir. 1998). Even in these circuits, however, an employer may enforce its rules against workplace misconduct under most circumstances. As the Tenth Circuit explained, the ADA's provisions that an employer need not make an accommodation that would impose an "undue hardship," nor retain an employee who would pose a "direct threat," establishes that there are certain levels of disability-caused conduct that need not be tolerated or accommodated by employers. *Den Hartog*, 129 F.3d at 1087. Most workplace conduct that would substantiate a decision to terminate should fall within this category; for example, workplace violence, harassment, and theft all fall well beyond the level of conduct that employers should have to tolerate.

Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001); *Newland v. Dalton*, 81 F.3d 904 (9th Cir. 1996).

The decision below overlooks this crucial distinction, treating Hernandez' workplace cocaine use as a mere incidental consequence of his possible drug addiction. Indeed, the Ninth Circuit described former employees terminated for drug use as individuals "whose only work-related offense was testing positive" because of their addiction. Pet. App. 13a. On the contrary, the work related offense was illegal drug use, and it is immaterial whether or not the offending employee happens to have an addiction.

2. EEOC Guidance Confirms That the ADA Permits Enforcement of Conduct Standards and Does Not Require Pardons Due to Disability

The Equal Employment Opportunity Commission, the federal agency with enforcement authority over Title I of the ADA, consistently has interpreted the statute as permitting an employer to enforce reasonable conduct standards, as long as they are applied consistently, even though it may mean that an employee faces discipline for conduct that can be traced to a mental or physical condition. For example, the preamble to the agency's 1991 regulations interpreting the ADA states that "employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and non-disabled, to the same performance and conduct standards." 56 Fed. Reg. 35726, 35733 (July 26, 1991). In Section 902 of the agency's Compliance Manual, which addresses the definition of "Disability" under the ADA, the EEOC states that an employer "does not have to excuse [an employee's] misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees." EEOC Compl. Man. (BNA) § 902.2 n.11 (Nov. 2002).

The EEOC included a lengthy discussion of conduct issues in its *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, issued in 1997. There, the agency confirmed that an employer may hold individuals with disabilities to conduct standards that are "job-related and consistent with business necessity" as long as they do so consistently—that is, as long as they would mete out the same discipline to an employee with no disability. The agency mentioned company policies against workplace violence, theft, and destruction of property as examples of conduct rules that would be considered job-related and consistent with business necessity. *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (Mar. 25, 1997) at 30-32, *reprinted in* EEOC Compl. Man. (BNA) 902:0131, 902:0139-40. The agency stated explicitly that an employer is not required to excuse past misconduct, *e.g.*, by rescinding a discharge once it learns that the conduct may have been caused by a disability. *Id.* at 31.

Similarly, the EEOC has confirmed that an employer's "reasonable accommodation" obligation under the ADA does not include forgiving past infractions. In enforcement guidance, the agency states that although an employer sometimes may have to make a reasonable accommodation to allow a qualified individual with a disability to meet a conduct standard in the future, it need not do so "where the punishment for the violation is termination." *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Oct. 17, 2002) at 36, *reprinted in* EEOC Compl. Man. (BNA) 902:0151, 902:0167 (footnote omitted). As the agency explained, "[s]ince reasonable accommodation is always prospective, an employer is not required to excuse past misconduct, even if it is the result of the individual's disability." *Id.* (citing *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666 (7th Cir. 1995)).

Accordingly, the federal agency with enforcement responsibilities for Title I of the ADA has interpreted that law as permitting employers to discipline employees for violating conduct rules, even if the misconduct may be traceable to a disability.

B. For the Same Reasons, Refusing To Rehire a Former Employee Terminated for Workplace Misconduct Does Not Violate the ADA

As explained above, terminating an employee for violating a workplace conduct rule does not violate the ADA, even if the conduct was somehow caused by or related to a disability. For the same reasons, applying a rule that makes a former employee "ineligible for rehire" if he or she was terminated for violating a workplace conduct rule likewise does not violate the law. In both cases, the reason for the action is the conduct—violation of the work rule—rather than any underlying explanation or excuse for the conduct.

Several circuit courts of appeals, in direct contrast to the Ninth Circuit below, have recognized that an employer's decision to disqualify former employees from eligibility for rehire if they were terminated for misconduct does not constitute disability discrimination, even if the underlying conduct allegedly was related to a disability. *E.g., Harris v. Polk County, Iowa*, 103 F.3d 696, 697 (8th Cir. 1996) (holding that employer did not violate ADA by refusing to consider for rehire employee who had been fired several years earlier after criminal conviction for shoplifting, even though she contend-ed that her shoplifting was caused by mental problems that had been resolved). *See also Flynn v. Raytheon Co.*, 94 F.3d 640, 1996 WL 468496 (1st Cir. Aug. 19, 1996) (unpublished) (former employee terminated for using alcohol in violation of workplace conduct rule was not entitled to second chance upon seeking reinstatement). A number of district courts have reached the same correct conclusion. *E.g., Peyton v. Otis Elevator Co.*, 72 F. Supp.2d 915 (N.D. Ill.

1999) (employer did not violate ADA by refusing to rehire former employee terminated for absenteeism caused by alcoholism); *Thomas v. Mississippi State Dep't of Health*, 934 F. Supp. 768 (S.D. Miss. 1996) (ADA did not require employer to overlook former employee's prior termination for absenteeism and negligence due to crack cocaine addiction).

Since, as shown above, the ADA permits an employer to terminate an employee for workplace misconduct regardless of disability, it also permits an employer to make employees who are terminated for conduct violations ineligible for rehire. Both rules are applied consistently to all employees who commit the same infraction, and both acknowledge an employer's inherent right to make and enforce legitimate rules regulating workplace conduct.

The decision below missed the point by focusing incorrectly on Hernandez' addiction during his employment and his purported rehabilitation after being terminated from Hughes. As the EEOC has said, the ADA does not require employers to forgive past misconduct. Thus, whether or not Hernandez was still a drug addict—or even whether he was using drugs at all—when he applied for rehire was irrelevant to his ineligibility, which was based solely on his misconduct during his previous sojourn with Hughes. Stated in different terms, Hernandez' ineligibility for rehire was based on his violation of Hughes' rule against drug use in the workplace, not on his record of having a drug addiction.

That the Ninth Circuit misunderstood the important distinction between refusal to rehire due to violation of a workplace conduct rule and disability discrimination is further shown by the comment at n.16 of its opinion. Pet. App. 11a n.16. There, the court finds it "interesting" that an applicant who tests positive for drugs is ineligible to re-apply for 12 months, while the employee who tests positive is ineligible forever. The employee who comes to work with drugs in his or her system has violated a work rule, placed

company equipment, product, and perhaps even lives in jeopardy, and abused the company's trust. The applicant who tests positive at the pre-employment stage has damaged only his own career options.

A ruling that the ADA invalidates an employer's "no rehire" policy as applied to drug addicts and others with disabilities effectively gives those individuals a hiring preference over other former employees who also broke workplace rules and received the same punishment. It forces employers to overlook and forgive conduct that they would never be expected to tolerate in a non-disabled individual. The Ninth Circuit's ruling should be reversed.

II. EMPLOYERS HAVE AN IMPORTANT BUSINESS NEED FOR THE ABILITY TO REFUSE TO REHIRE FORMER EMPLOYEES WHO WERE DISCHARGED FOR VIOLATING WORKPLACE CONDUCT RULES

A. Employers Establish Work Rules for Legitimate and Nondiscriminatory Business Reasons

Many if not all employers have adopted rules that establish minimum standards for employee conduct in the workplace. Safety concerns provide one reason for having such rules. A worker who is fighting, threatening violence, engaging in horseplay that distracts other workers, or working carelessly or without protective equipment, can cause an accident, injuring himself, coworkers, and perhaps the public. Productivity expectations are another reason, giving rise to rules against insubordination, excessive absenteeism, repeated tardiness, and excessive personal telephone calls. Some conduct rules, such as those governing respect for coworkers, use of employer-provided e-mail, and the like, are based at least in part on legal requirements, such as potential employer

liability for workplace harassment. Prohibitions against the use of drugs and alcohol fall into all three categories.

In virtually every company, violation of conduct rules can lead to discipline up to and including termination. Enforcement of a conduct rule not only supports the legitimate goal underlying the rule itself, but encourages future compliance by other employees.

B. Considering Employees Who Have Been Terminated for Misconduct as Ineligible for Rehire Is a Common Practice Grounded in Legitimate Business Purposes

Like Hughes in this case, many companies as a matter of policy consider an employee's termination for violating a work rule as a permanent bar to eligibility for rehire. Terminations for violating rules against using drugs or alcohol, threatening or assaulting another employee, bringing a firearm to work, stealing, or sexual harassment typically trigger such a policy. Indeed, any infraction that is serious enough to warrant termination also could be considered serious enough to make the individual ineligible for rehire at any future date.

The customary practice of marking on such an employee's file that he or she is "ineligible for rehire" serves three purposes. First, it allows those who may be involved in that individual's future application to make appropriate decisions without revisiting the original infraction, thus confirming the finality of business decisions that were appropriate when made. Second, it provides a neutral means of ensuring that anyone who has been fired once for an infraction so severe that it warranted the ultimate discipline is not accidentally rehired by someone who lacks access to the record. Third, it actually protects the individual, since the designation "ineligible for rehire" is sufficient unto itself and obviates the need for someone who was not involved in the original

decision to delve into all of the often unsavory details surrounding it.

The practice is particularly common with respect to former employees terminated for violation of a company's prohibitions against drug abuse. For example, the U.S. Department of Labor, as part of its "Substance Abuse Information Database," which is designed as a resource for employers, maintains a booklet incorporating a model "drug free" policy which provides that employees terminated for drug use following company sponsored rehabilitation "will be ineligible for rehire." United States Dep't of Labor, *What Works: Workplaces Without Alcohol and Other Drugs* (1994) (Appendix A: Workplace Substance Abuse Policy Models, Sample 2: Drug-Free Policy of (Company B), at 23 [p.7 of .pdf]) [6].

Such varied employers as a concessionaire at Mt. Rushmore [7], the Mt. Vernon Community School Corporation in Fortville, Indiana [8], and the Johns Hopkins Health System (which marks *any* employee discharged for any reason other than job performance ineligible for rehire) [9], have all adopted the same practice. So has a Southeastern utility company, which provides in its policy that "[A]n employee involuntarily terminated by the Company, regardless of the

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[6] *available at http://said.dol.gov/SAID_Attachments/553said5.pdf.*

[7] Xanterra Parks and Resorts, *Mount Rushmore Drug and Alcohol Policy, available at http://www.coolworks.com/rushmore/policy.htm* (last visited May 6, 2003).

[8] Mt. Vernon Community School Corp., *Policies and Bylaws, available at http://www.mvcsc.k12.in.us/4000.html#eap* (last visited May 6, 2003).

[9] Johns Hopkins Health System, *Employee Handbook—Non-Represented Employees* (Separation), *available at http://www.hopkinsmedicine.org/jhhr/hbook_nb.htm#nbu36* (last visited May 6, 2003).

reason for termination, is ineligible for reemployment."[10] The University of Nebraska at Lincoln does the same.[11] Indeed, a company that performs pre-employment screening reported last year that 11% of the employers the company contacted as part of the 2.6 million background verifications it performed in the year 2001 reported applicants ineligible for rehire. Automatic Data Processing, Inc. (ADP) Hiring Index (2001).[12]

Employers adopt such policies for their own protection and that of their other employees and the public. An infraction serious enough to warrant the ultimate punishment—termination—is likely to be an egregious one. "No rehire" policies essentially guarantee that there will be no reoccurrence.

Where the situation involves an infraction of a rule designed to promote safety, such as those against substance abuse, workplace violence, and the like, "no rehire" policies guard other employees and the general public from physical injury, and the employer from legal liability and public recriminations. Similarly, an employee who has engaged in sexual harassment that is either severe or repeated is likely to be terminated, and a "no rehire" rule protects his or her victims from further abuse and the company from liability under Title VII.[13] Some company work rules protect the

[10] BNA Human Resources Library, POL:25:701 *available at http://hrlibrary.bna.com* (RESOURCES Sample Policies and Forms POL:25:701).

[11] University of Nebraska Lincoln, *Guidelines for Recruitment and Hiring of Office/Service Employees available at http://busfin.unl.edu/hr/oshiringguidelines.htm*, at 11.

[12] *available at http://www.investquest.com/iq/a/aud/ne/news/adpmisleading.htm.*

[13] Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, prohibits discrimination in employment on the basis of

company's property interests, *e.g.*, rules against stealing tools or other items belonging to the company. When an employee is terminated for violation of rules such as these, a "no rehire" rule simply prevents the company from unintentionally giving the thief another opportunity to steal.

An employer has a significant investment in every employee, in terms of the resources spent to recruit, hire and train each individual in the its workforce. Accordingly, the decision to terminate an employee necessarily is a difficult one, because the employer essentially loses its investment. For the same reasons, having a rule that some former employees are ineligible for rehire essentially means a lost opportunity to recoup the investment. In making both the decision to terminate and the decision to establish a "no rehire" rule, an employer has made a business judgment that the risk of continuing to employ or reemploying this person outweighs the value of the investment.

C. A Decision Preventing Employers From Refusing Rehire to an Employee Terminated for Workplace Misconduct Would Seriously Undermine Their Ability To Enforce Conduct Standards

The decision below results in an automatic right to a "second chance" to any worker fired for misconduct, even drug use,[14] if he or she can somehow tie the infraction to a

membership in various protected classes, and includes sexual harassment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

[14] Drug abuse remains a serious problem for employers. According to the 2001 *National Household Survey on Drug Abuse* report, published by the U.S. Department of Health and Human Services last August, "most drug users were employed. Of the 13.4 million illicit drug users aged 18 or older in 2001, 10.2 million (76.4 percent) were employed either full or part time." Office of Applied Studies, Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services, *Results from the 2001 National Household Survey*

disability. Based on the Ninth Circuit's reasoning, an employer would be liable under the ADA if it refused to rehire a former employee who was terminated for attacking a coworker or customer, for embezzling company funds, for sexual harassment, for extreme or repeated carelessness, for boisterous and disruptive behavior, for execrable performance, or any number of other legitimate reasons, as long as the former employee can establish that the misconduct stemmed from a disability. Even if the would-be plaintiff fails to qualify as an "individual with a disability" under the ADA and this Court's decision in *Toyota Motor Mfg., Inc., v. Williams*, 534 U.S. 184 (2002), the employer will still have faced the threat, or indeed the fact, of costly litigation merely because it sought to uphold a legitimate work rule it established in order to run its business properly.

Accordingly, affirming the decision below would tie the hands of every employer that desires to maintain discipline in its workforce, to guard against safety hazards, comply with legal requirements, ensure product and service quality, maintain its reputation, and promote an atmosphere that is conducive to retaining good employees. No termination will ever be final. In addition, the Ninth Circuit's rule also has the consequence of placing employers in the untenable position of having to consider for rehire former employees who present a known and demonstrated hazard.

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on Drug Abuse (Aug. 2002), *available at http://www.samhsa.gov/oas/NHSDA/2k1NHSDA/vol1/Chapter2.htm*, at 21. According to a 1995 survey by the Gallup Organization, commissioned by the Institute for a Drug-Free Workplace, 35% of employees surveyed responded that they were aware of illicit drug use by their coworkers on-the-job. Institute for a Drug-Free Workplace, *What American Employees Think About Drug Abuse* (1995) (Figure 13: Awareness of On-The-Job Illicit Drug Use By Co-Workers), *available at http://www.drugfreeworkplace.org/survey/page23.html.*

The decision below thus undermines the best practices of good employers, who maintain progressive discipline procedures that give employees every chance to succeed. It also counteracts those efforts of good employers who, as Hughes did here, provide and pay for rehabilitation for substance-abusing employees and resort to termination only after such efforts fail.

CONCLUSION

For the reasons set forth above, the *amici curiae* Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully request that the decision below be reversed.

Respectfully submitted,

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RAYTHEON CO., *PETITIONER*,

v.

JOEL HERNANDEZ, *RESPONDENT*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF THE *AMICI CURIAE*

The *amici curiae* joining this brief are organizations that represent individuals with disabilities, including those who are rehabilitated drug addicts. The *amici* share a commitment to eradicating the debilitating obstacles faced by persons with disabilities, and to ensuring equality and reasonable accommodation in the workplace and other settings subject to federal disability law. The *amici* have a strong interest in the effective implementation of the Americans with Disabilities Act ("ADA"), and bring a unique understanding of the purpose and role of laws barring disability discrimination. A full recitation of their interest appears in the Appendix.[1]

PROCEDURAL HISTORY AND SUMMARY OF ARGUMENT

On February 24, 2003, this Court granted *certiorari* on the following question proffered by the Petitioner: "Whether the Americans with Disabilities Act confers preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use." This broadly phrased question appears drafted to reach several important questions of first impression to this Court, including: (1) the appropriate analysis for reviewing neutral hiring policies that allegedly discriminate by "screening out" a person with a disability; (2) under what circumstances an applicant and rehabilitated drug addict may be entitled to reasonable accommodation; and (3) the relationship between a disability and "misconduct" purportedly caused or compelled by the disability.[2] And, indeed, the briefs submitted on behalf of

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[1] No contributions were made to this brief by counsel for the parties. No monetary contributions were made other than by *amici*. Sup. Ct. R. 37.6.

[2] The question does *not* encompass the question of whether the Respondent is an individual with a disability. The Ninth Circuit ruled

the Petitioner focus upon questions of reasonable accommodation and "misconduct."[3]

In actuality, the facts of this case and its record below cannot withstand the weight of these interesting matters. This case was litigated and decided based upon a garden-variety intentional discrimination theory. The Respondent has not raised a reasonable accommodation claim, and both the trial and appellate courts concluded that the Respondent waived his disparate impact claim. *Hernandez v. Hughes Missile Sys. Co.*, 298 F.3d 1030, 1037 n.20 (9th Cir. 2002); *Hernandez v. Hughes Missile Sys. Co.*, No. CV 98-319 (D. Ariz., Jan. 31, 2001).[4] Further, the Respondent has not argued that his prior "misconduct" should be excused; rather, he has argued that the Petitioner's refusal to re-hire him, years later, was motivated by disability discrimination.

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that as a rehabilitated drug addict, the Respondent is protected under the ADA as a person with a record of or a perceived disability. *Hernandez v. Hughes Missile Sys. Co.*, 298 F.3d 1030, 1035 (9th Cir. 2002). The Petitioner did not seek *certiorari* on the question of disability, and the issue is not before the Court. *See* Sup. Ct. R. 14.1(a).

[3] *See, e.g.*, Brief for Petitioner at 12-13; Brief *Amici Curiae* of the Equal Employment Advisory Council and the Chamber of Commerce of the United States at 5-6.

[4] On this point, the undersigned agree with the United States. Brief for the United States at 17 n.5; *see also Gonzalez v. City of New Braunfels*, 176 F.3d 834, 839 (5th Cir. 1999) ("[A]s Gonzalez failed even to plead a disparate impact claim, the burden never shifted to the department to prove that its qualification requirements for the position of evidence technician are job related and consistent with business necessity."); *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1197-98 (7th Cir. 1997) ("[Plaintiff] has not tried to make a disparate-impact case by presenting evidence that the rating system bears more heavily on the disabled and is not justified by the needs of [defendant's] business. He mentions the point in a sentence in his brief, but neither develops nor substantiates it; it is therefore waived, and we do not consider it."); *F.D.I.C. v. Deglau*, 207 F.3d 153, 169 (3d Cir. 2000) (because appellants "did not raise this issue in their opening brief on appeal, they have therefore waived it, and we will not address it").

Given this procedural posture, the *amici* urge this Court to limit its review to the simple question of whether the Ninth Circuit's determination that triable evidence of intentional discrimination existed was consistent with *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

Consistent with *Reeves*, this Court should affirm the Circuit Court. While the Petitioner argued that its unwritten, purportedly neutral hiring policy provided a legitimate, nondiscriminatory reason for its action, the Ninth Circuit disagreed. The policy at issue, while not expressly mentioning disability, by its terms excluded rehabilitated drug addicts such as the Respondent. Yet such rehabilitated persons, with a past history of disabling addiction, are expressly included within the ADA's protections. 42 U.S.C. § 12114(b). The appellate court properly rejected the asserted defense, as the policy itself acts as a proxy for intentional discrimination against persons protected by the Act. Given the entire record, the Respondent presented sufficient evidence of pretext to survive summary judgment.

It is hazardous for an appellate court to engage in a hypothetical inquiry into all of the theories of discrimination that might have been alleged, developed through discovery, and briefed below.[5] Indeed, this Court has repeatedly stated

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[5] This Court has reconsidered the granting of a petition under comparable circumstances. *See Needelman v. United States*, 362 U.S. 600, 600 (1960) ("After hearing oral argument, and further study of the record, we conclude that the record does not adequately present the questions tendered in the petition."); *McCarthy v. Bruner*, 323 U.S. 673, 674 (1944) (writ of certiorari "dismissed as improvidently granted" where "petitioners' contentions ... are either insubstantial or not properly raised on the record"); *Kimbrough v. United States*, 364 U.S. 661, 661 (1961) (writ of certiorari dismissed where question sought to be reviewed is not presented with "sufficient clarity"); *see also Nike, Inc. v. Kasky*, 2003 U.S. LEXIS 5015, at *17-18 (June 26, 2003) (Stevens, J., concurring) ("The correct answer to such questions [raised by First amendment

that it will not rule on questions in the first instance that were not decided below. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001); *Delta Airlines, Inc., v. August*, 450 U.S. 346, 362 (1981). However, in the event that the Court does consider the application of additional theories of discrimination to this case, the *amici* also submit this brief to aid the Court in its review.

First, contrary to the Petitioner's opening brief at page 11, "discrimination" under the ADA is not limited to employer actions constituting traditional disparate treatment or the failure to make reasonable accommodations. Rather, prohibited discrimination includes using qualification or selection criteria that "screen out or tend to screen out" an individual with a disability, or a class of individuals with disabilities, 42 U.S.C. § 12112(b)(6), or that "have the effect of discrimination on the basis of disability," 42 U.S.C. § 12112(b)(3)(A). *See also* 42 U.S.C. § 12112(a).

Under these provisions, neutral employer policies such as Petitioner's no-rehire policy may be challenged as unnecessarily excluding a person with a disability. Such "disparate impact" or "screen out" claims are particularly important to secure equal employment opportunities for rehabilitated illegal drug addicts. As persons who *by definition* have a history of using unlawful drugs, rehabilitated illegal drug addicts are especially vulnerable to being screened out and adversely affected by facially neutral policies that render them ineligible for employment based on prior violations of company rules or criminal laws.

The Act specifies that an eligibility criterion that excludes a disabled person is permitted only if the employer can demonstrate that it is "job-related and consistent with

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challenge] is more likely to result from the study of a full factual record than from a review of mere unproven allegations in a pleading.").

business necessity." 42 U.S.C. §§ 12112(b)(6), 12113(a). Here, the Petitioner did not undertake to make such a showing. *Hernandez*, 298 F.3d at 1037 n.19. Further, even if the criterion were job-related and necessary, the employer would still be required to determine whether a reasonable accommodation would enable the applicant to fulfill the prerequisite, or whether a less onerous alternative policy would equally serve the employer's need.

Second, under some circumstances reasonable accommodations are required by the statute with respect to disabilities that are not "actual," but are perceived or past disabilities. Here, because of the Respondent's impairment – his rehabilitated drug addiction and the resulting record of a positive drug test at work – he could not overcome the Petitioner's no-rehire policy without the reasonable accommodation of individualized consideration. Petitioner's refusal to consider the Respondent's application may be reviewed as a denial of an employment opportunity to a job applicant based on the employer's need "to make reasonable accommodation to the physical or mental impairments" of the applicant. *See* 42 U.S.C. § 12112(b)(5)(B).

ARGUMENT

I. THE NINTH CIRCUIT'S REMAND OF THIS MATTER WAS CONSISTENT WITH, AND REQUIRED BY, *REEVES*, 530 U.S. 133.

In considering a defendant employer's motion for summary judgment, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 255 (1986)). Accordingly, the reviewing court must "disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151.

Here, consistent with these standards, the record contains evidence sufficient to create a triable issue of fact with respect to whether Petitioner intentionally discriminated against respondent Joel Hernandez on the basis of his disability in violation of 42 U.S.C. § 12112(a).[6] Upon reviewing this record, the Ninth Circuit concluded that "Hernandez raises a genuine issue of material fact as to

[6] The Petitioner asserts that it was unaware of Respondent's history of drug addiction and rehabilitation at the time that it rejected his application for employment. However, in response to Respondent's charge of discrimination with the Equal Employment Opportunity Commission, Hughes Missile Systems Manager George M. Medina, Sr., on behalf of the Petitioner, described Respondent's history of alcoholism, drug dependence, and related treatment, and stated that his "application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation." Joint Appendix at 17a, 19a; *see also Hernandez*, 298 F.3d at 1033-34. Medina further asserted that the ADA section expressly including rehabilitated drug addicts was not applicable to the Respondent because he "has provided no evidence to demonstrate that he has either successfully completed or is currently undergoing drug rehabilitation." Joint Appendix at 19a n.2. Additionally, the decisionmaker identified by the Petitioner in this matter, Joanne Brockmiller, admittedly had access to Respondent's personnel file and his application which included documents referencing Respondent's history of addiction and current recovery. *Id.* at 14a-15a, 22a, 49a-50a, 52a-56a, 78a; *see also Hernandez*, 298 F.3d at 1034. Similarly, other agents of the Petitioner had information about the Respondent's history of alcoholism, drug dependence, and related treatment. *Id.* at 26a-30a, 89a-92a. The only basis for Respondent's separation was his violation of the alcohol and drug policy. *Id.* at 37a, 71a-73a. Upon concluding its investigation, the EEOC found cause to believe that discrimination had occurred against the Respondent. *Id.* at 93a-95a. While the Petitioner disputes the inferences and conclusions to be drawn from this evidence, triable issues of fact remain, and remand was proper.

whether he was denied re-employment because of his past record of drug addiction." *Hernandez*, 298 F.3d at 1034. Accordingly, the Ninth Circuit's remand of this matter back to the trial court was appropriate and indeed required by this Court's decision in *Reeves*.

To rebut the Respondent's case, the Petitioner cited its unwritten, "word of mouth"[7] company policy not to rehire employees who were terminated or resigned in lieu of discharge due to their violation of the company's code of conduct.[8] In contrast to this unwritten policy, the official written company policy automatically permitted new job applicants who tested positive for drugs or alcohol to re-apply 12 months later with evidence of rehabilitation.[9]

The Ninth Circuit remained unconvinced by the proffered defense, noting that "[m]aintaining a blanket policy against rehire of *all* former employees who violated company policy . . . screens out persons with a record of addiction who

[7] *See* Deposition of George Medina, pp. 23:14-21 (filed with the Ninth Circuit as part of the excerpts of record).

[8] Given the record here – which the appellate court concluded created a triable issue of fact as to whether Respondent was rejected "because of his past record of drug addiction," *Hernandez*, 298 F.3d at 1034 – any nondiscriminatory reason asserted by Petitioner could only be considered as part of a "mixed motive" theory. *See Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2150 (2003) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989), that an employer could "avoid a finding of liability . . . by proving that it would have made the same decision even if it had not allowed gender to play such a role."); *cf. Hernandez*, 298 F.3d at 1035 (citing burden-shifting scheme of *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

[9] Joint Appendix at 81a, 83a, 86a-88a. Medina acknowledged that a similar policy for former employees, one permitting them to be considered for employment if they are rehabilitated and pass a drug test, would provide the company with all the information it needed to determine whether a former employee was successfully rehabilitated. Medina depo. 115: 13-24.

have been successfully rehabilitated[.]" *Hernandez*, 298 F.3d at 1036; *see also id.* at 1037 n.19 ("We note that Hughes has not raised a business necessity defense"). Although the panel concluded that the Respondent had waived his disparate impact claims, *id.* at 1037 n.20, the court properly considered the policy's effects, as such evidence is relevant to whether the Respondent has created a triable issue on disparate treatment claim.[10]

Additionally, not all purportedly neutral policies are truly "neutral" for purposes of disparate treatment claims. Some policies, while technically neutral, are actually discriminatory because they regulate or treat adversely a characteristic that is a proxy for a protected classification. In *McWright v. Alexander*, the Seventh Circuit analyzed another facially neutral policy challenged as part of a disparate

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[10] *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973) ("Other evidence that may be relevant to any showing of pretext includes... petitioner's general policy and practice with respect to [employment of members of the protected class]."); *Keathley v. Ameritech Corp.*, 187 F.3d 915, 923-24 (8th Cir. 1999) (pattern of replacement of older salespeople, with other evidence, permitted inference of intentional age discrimination); *McMillan v. Mass. S.P.C.A.*, 140 F.3d 288, 303 (1st Cir. 1998) (statistical evidence regarding pay disparities properly considered by jury as evidence of disparate treatment); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 163-64 (2d Cir. 1998) (termination of six other road sales representatives over fifty properly considered by jury as evidence of intentional discrimination); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1995) (analysis of racial makeup of workforce properly considered by jury as evidence of pretext and intentional race discrimination); *Greene v. Safeway Stores*, 98 F.3d 554, 561 (10th Cir. 1996) (pattern of removals of older employees created triable issue of fact on plaintiff's disparate treatment claim, requiring reversal of trial court's granting of summary judgment in favor of employer); *Eskra v. Provident Life & Accident Ins. Co.*, 125 F.3d 1406, 1412-13 (11th Cir. 1997) (expert testimony on pattern of adversely affected older managers considered as part of evidence creating triable issue on pretext).

treatment claim, and ruled that "an employer cannot be permitted to use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination." 982 F.2d 222, 228 (7th Cir. 1992); *see also id.* at 228 ("[T]he distinction between disparate treatment and disparate impact becomes fuzzy at the border, and [the plaintiff asserting disparate treatment] might conceivably be able to show that this is one of those 'proxy' situations where a case may be made for 'constructive' disparate treatment, if not actual disparate treatment."); *cf. Hazen Paper v. Biggins*, 507 U.S. 604, 613 (1993) ("Pension status may be a proxy for age [in an ADEA case]... in the sense the employer may suppose a correlation between the two factors and act accordingly.").

A. Purportedly Neutral Rules Excluding Rehabilitated Drug Addicts Must Be Closely Scrutinized to Determine Whether They Intentionally Discriminate.

Close scrutiny is particularly important in the context of policies that exclude rehabilitated drug addicts, as there are many "neutral" characteristics that function as proxies for past illegal drug addiction. For example, a rule that an employer will not hire anyone who has ever violated any drug law, who has ever possessed illegal drugs, or who has ever illegally used drugs, does not reference disability or drug addiction, but excludes 100 percent of rehabilitated drug addicts.[11] At the same time, Congress chose after a long and careful debate to explicitly retain protection for rehabilitated drug addicts:

(a) For purposes of this title, the term "qualified

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[11] In this regard, the undersigned *amici* disagree with the United States' analysis. *See* Brief for the United States at 15-16. Such policies directly target proxies which cannot be deemed analytically distinct from the protected trait of rehabilitated drug addiction.

> individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.
>
> (b) Rules of Construction – Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who . . . has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use or drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use[.]

42 U.S.C. § 12114(a)-(b)(1).[12]

The Act's sponsors cited the importance of granting equal opportunities to individuals who have successfully recovered from addiction as well the nation's interest in promoting rehabilitation:

> Treatment can save the lives of individual abusers, and it can also return them to productive roles in society which strengthens our families, our communities, our economy, and our ability to meet

[12] Because a record of disability, or a perceived disability, ordinarily relates back to a covered disability, *see* 42 U.S.C. § 12102(2), special text had to be added to ensure coverage for persons with past or perceived drug addiction: "[U]nder the standard Rehabilitation Act analysis, an individual with a past or perceived disability is protected only if the actual physical or mental condition at issue is itself a disability. Because the condition of current drug use is no longer a disability for purposes of this Act, it is necessary to state that nothing in the exclusion of illegal drug use . . . shall be construed to mean that persons with past or perceived illegal drug dependence conditions are necessarily denied coverage under the Act." House Comm. on Education and Labor, H.R. Rep. No. 485 (II), 101st Cong., 2d Sess., at 77 (1990).

> the competitive challenges of the growing international marketplace. By providing protections against discrimination for recovered substance abusers and those in treatment or recovery who are no longer engaged in illegal drug use, the bill provides an incentive for treatment. Under this bill, no one who seeks treatment and overcomes a drug abuse problem need fear discrimination because of past drug use. 136 Cong. Rec. H2443-H2444 (May 17, 1990) (Statement of Rep. Rangel).

Retaining these protections for persons who formerly used or were addicted to illegal drugs, but who have successfully been rehabilitated and no longer use illegal drugs, is an absolutely essential component of our national war against drugs. It also helps to carry out our national commitment to encourage all those who need it to come forward for treatment, and to ensure that individuals who have successfully overcome drug problems will not face senseless or irrational barriers that work to impede their full reintegration into society. 135 Cong. Rec. S 10775 (Sept. 7, 1989) (Statement of Sen. Kennedy).[13]

Plainly, rehabilitated drug addicts who are seeking to rejoin society as productive, contributing members cannot do so if they are barred from opportunities based on their past drug use – the very history that renders them protected by the Act.

In the context of a school teacher with a record of tuberculosis, this Court has held that "the contagious effects of a disease [cannot] be meaningfully distinguished from the

[13] *See also* H.R. Rep. No. 485(II) at 77 ("In removing protection for persons who currently use illegal drugs, the Committee does not intend to affect coverage for individuals who have a past drug problem or are erroneously perceived as having a current drug problem.").

disease's physical effects on a claimant." *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 282 (1987).[14] Here, the effects of the Respondent's disability – his prior drug use – cannot be meaningfully distinguished from his rehabilitated drug addiction.[15] There is an undeniable equivalence between the status of being a rehabilitated drug addict, and the past "conduct" of using illegal drugs.

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[14] *See also E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 149 (1st Cir. 1997) (distinguishing between conduct compelled by disability and conduct too attenuated to be protected); *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1086-87 (10th Cir. 1997) (rejecting "sharp dichotomy" between disability and disability-caused conduct, with the exception of employer actions encompassed by § 12114(c)(4)); *Teahan v. Metro North Commuter R.R. Co.*, 951 F.2d 511, 516-17 (2d Cir. 1991) (employer cannot avoid discrimination claim by basing termination on conduct o circumstance that is a manifestation or symptomatic of disability).

[15] The Petitioner attempts to distinguish between the Respondent's status of being a rehabilitated drug addict and his past "action" of showing up to work with illegal drugs in his system. A person with a history of being an employed illegal drug addict – a person who repeatedly uses illegal drugs in an addictive manner while holding down a job – is nearly certainly a person with a history of being at work with illegal drugs in his or her body. This is both common sense as well as medical science. *See* Edward J. Cone, "New Developments in Biological Measures of Drug Prevalence," published in Lana Harrison, Ph.D and Arthur Hughes, M.D., eds., Research Monograph No. 167, *The Validity of Self-Reported Drug Use: Improving the Accuracy of Survey Estimates* (National Institute on Drug Abuse, 1997), at p. 114 (urinalyis can detect cocaine and heroin during period of 1 to 3 days after use, marijuana during period of 1 to 3 days after use for casual use and up to 30 days for chronic use, amphetamines during period of 2 to 4 days after use, and barbituates for period of 2 to 4 days for short acting and up to 30 days for long acting), p. 118 (saliva testing can detect very recent drug use), p. 119 (sweat patch can detect drugs for up to 4 weeks after use, and hair testing can detect drugs for months after use); *see also* House Comm. on Conference, H.R. Rep. No. 596, 101st Cong., 2d Sess (1990), at 87 (the provision excluding individuals engaging in the illegal use of drugs "is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current.").

An employer policy that penalizes a rehabilitated drug addict for past illegal drug use is inconsistent with the plain language and underlying policies of section 104. Accordingly, the Ninth Circuit held that "Hughes's unwritten policy that it will not rehire employees who left the company due to violations of personal conduct rules violates the ADA, as applied to employees with the disability of drug addiction whose only work-related offense was testing positive for drug use but are now rehabilitated." *Hernandez*, 298 F.3d at 1037.[16]

B. Congress Provided Employers With Ample Discretion to Protect Against the Effects of Current Drug Use.

Scrutiny of the Petitioner's no-rehire policy is further warranted because Congress granted employers all necessary discretion to protect against the effects of *current* illegal drug use. Outlined in explicit detail, this discretion includes:

> excluding employees and applicants who are "currently engaging in the illegal use of drugs," 42 U.S.C. § 12114(a);
>
> permitting employers to adopt "reasonable policies or procedures, including but not limited to drug testing, designed to ensure that [a rehabilitated drug addict] is no longer engaging in the illegal use of drugs," 42 U.S.C. § 12114(b);
>
> permitting employers to prohibit the use of illegal drugs in the workplace, 42 U.S.C. § 12114(c)(1), (2);

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[16] The Court may find the appellate panel's determination premature, given disputed questions of fact, or unwarranted given the Respondent's litigation choices below. This determination, however, is not essential to the proper remand of this claim under *Reeves*.

permitting employers to "hold an employee who engages in the illegal use of drugs . . . to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use . . . of such employee," 42 U.S.C. § 12114(c)(4);

permitting employers to require that employees comply with the Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 *et. seq.*, as well as any applicable regulations or standards of the Department of Defense, the Nuclear Regulatory Commission, and the Department of Transportation, 42 U.S.C. § 12114(c)(3), (5); and

exempting drug testing from the Act's rules limiting medical examinations, 42 U.S.C. § 12114(d).

Here, the Petitioner sought an additional exemption, one *not* listed in section 104, for a hiring criterion which essentially excluded a rehabilitated drug addict on the basis of his past use of illegal drugs. Permitting such a policy to defeat, on summary judgment, the Respondent's claim of intentional discrimination would be inconsistent with the text and underlying purposes of Congress's carefully drafted compromise on illegal drug addiction.

In light of the entire record, including the inevitable impact of the Petitioner's policy, the Court of Appeals correctly concluded that the unwritten rule was insufficient to support the granting of summary judgment in favor of the Petitioner on the question of intentional discrimination.

II. THE ADA PERMITS NEUTRAL POLICIES, SUCH AS THE PETITIONER'S ASSERTED NO-REHIRE POLICY, TO BE CHALLENGED AS QUALIFICATION STANDARDS OR SELECTION CRITERIA THAT SCREEN OUT OR TEND TO SCREEN OUT AN INDIVIDUAL WITH A DISABILITY OR A CLASS OF INDIVIDUALS WITH DISABILITIES.

Section 102(b)(6) of the ADA defines disability discrimination to include the use of "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, unless the standard" is "job-related for the position in question and is consistent with business necessity." 42 U.S.C. § 12112(b)(6). Section 102(b)(3)(A) similarly prohibits the use of criteria that "have the effect of discrimination on the basis of disability." 42 U.S.C. § 12112(b)(3)(A).[17]

This rule is based upon regulations promulgated under Section 504 of the Rehabilitation Act:

> A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown ... to be available.

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[17] In addition, the ADA's general prohibition on discrimination, 42 U.S.C. § 12112(a), includes a prohibition on disparate impact if interpreted as this Court has construed analogous civil rights provisions. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

45 C.F.R. § 84.13(a); *see also* Senate Comm. on Labor and Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess. 38 (1989); House Comm. on Educ. and Labor, H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 72 (1990); and House Comm. on the Judiciary, H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 42 (1990) (all referencing 45 C.F.R. § 84.13). The purpose of the rule is "to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job." 29 C.F.R. pt. 1630, app. § 1630.10.

The Petitioner's no-rehire rule fits easily within the range of selection criteria that may be reviewed under section 102(b)(6). The provision "appl[ies] to all selection standards and procedures, including, but not limited to: education and work experience requirements; physical and mental requirements; safety requirements; . . . interview questions; and rating systems." EEOC, *Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disability Act* § 4.1 (1992); *see also* 29 C.F.R. § 1630.2(q) ("Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.").

Courts have reviewed a wide variety of facially neutral practices under the ADA's "screen out" standard. *See, e.g., Cripe v. City of San Jose*, 261 F.3d 877, 889-90 (9th Cir. 2001) (officer transfer policy requiring beat-patrol service as a "qualification standard" for securing special assignment screened out disabled officers who could not perform beat duties); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 699 (7th Cir. 1998) ("In our view, the separate criterion of 'physical fitness' – unrelated to job requirements – as a qualification standard for promotions,

layoffs and recalls tends to screen out, whether intentionally or unintentionally, disabled employees."); *McWright v. Alexander* 982 F.2d 222, 229 (7th Cir. 1992) (employee challenging neutral leave of absence rules created triable issue of fact under disparate impact theory); *cf. Matthews v. Commonwealth*, 128 F.3d 1194, 1195-96, 1197 (7th Cir. 1997).[18] Notably, in *E.E.O.C. v. Exxon*, the Fifth Circuit ruled that §§ 12112(b)(6) and 12113(a) provide relevant standards for reviewing an employer's policy of removing from certain jobs employees who had received substance abuse treatment. 203 F.3d 871, 872, 873 (5th Cir. 2000).

The type of discrimination described by section 102(b)(6) is similar to Title VII's "disparate impact" theory, first articulated by this Court in in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *See Gonzalez v. City of New Braunfels*, 176 F.3d 834, 839 n.26 (5th Cir. 1999) ("Recognized as an actionable form of discrimination under Title VII, the disparate impact theory has been adopted entirely by the ADA."). In *Griggs*, this Court explained that Congress was concerned with the "*consequences* of employment practices, not simply the motivation." 401 U.S. at 432 (emphasis in original). Courts have repeatedly relied upon disparate impact theory to review challenges brought under Title VII to selection criteria comparable to Petitioner's no-rehire policy.[19]

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[18] Cases decided under the Rehabilitation Act are consistent. *See Stutts v. Freeman*, 694 F.2d 666, 669-70 (11th Cir. 1983) (written test for training program screened out applicant with dyslexia); *Prewitt v. U.S.P.S.*, 662 F.2d 292, 309-10 (5th Cir. 1981) (disabled veteran created triable issue of fact as to whether physical fitness test screened him out without being sufficiently job-related). The legislative history of the ADA endorses *Stutts* and *Prewitt*. S. Rep No. 116 at 38 (discussing *Stutts*); H.R. Rep No. 485(II) at 71-72 (same); H.R. Rep No. 485(III) at 42 (discussing *Prewitt*).

[19] *See, e.g., Gregory v. Litton Sys.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (race-neutral policy of disqualifying persons with history of

Contrary to the Petitioner's suggestion, nothing in section 104(c)(4) prohibits a "screen out" challenge to its neutral hiring rule. That provision allows an employer to "hold an employee *who engages* in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee[.]" 42 U.S.C. § 12114(c)(4) (emphasis added).[20] Here, the no-rehire rule was applied to a rehabilitated individual – *who was no longer engaging* in the

multiple arrests discriminated against black applicants), *modified as to remedy and aff'd*, 472 F.2d 631 (9th Cir. 1972); *United States v. Chicago*, 385 F. Supp. 543, 549-50 (N.D. Ill. 1974) (policy of disqualifying applicants for police positions based on arrests, negative employment record, and other factors discovered through "background investigation" discriminated against black applicants), *aff'd in relevant part*, 549 F.2d 415, 432 (7th Cir. 1977); *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952, 960 (D.D.C. 1980) (arrest record inquiry adversely affected black applicants), *aff'd*, 702 F.2d 221 (D.C. Cir. 1981); *Carter v. Gallagher*, 452 F.2d 315, 326 (8th Cir. 1971) (affirming injunction barring consideration of arrest records of firefighter applicants, and directing trial court to ensure that any consideration of conviction records is tailored to the applicant's fitness); *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1298-99 (8th Cir. 1975) (policy of rejecting persons convicted of any crime other than minor traffic offense discriminated against minority applicants); *Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490, 494-95 (C.D. Cal. 1971) (policy of discharging employees whose wages had been garnished discriminated against racial minorities); *Wallace v. Debron Corp.*, 494 F.2d 674, 676-77 (8th Cir. 1974) (policy of automatically discharging employees with more than one wage garnishment in twelve months imposed disparate impact, and must be justified by employer on remand); *cf. New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979) (weak statistical showing failed to demonstrate *prima facie* case of disparate racial impact).

[20] This provision was designed to prevent, for example, a drug addict from challenging a termination for using drugs or testing positive in the workplace, or for failing to meet rules and standards while under the influence. Here, Respondent does not challenge his original separation.

illegal drug use. Section 104(c)(4) affords Petitioner no defense; rather, that section plainly leaves such policies open to the challenge that they screen out rehabilitated addicts.[21]

A. Rehabilitated Illegal Drug Addicts Such as Joel Hernandez – Who Are Explicitly Included By The Act's Provisions – Are Especially Vulnerable To Being Adversely Affected Or Screened Out By Policies Such As The One Challenged Here.

Consistent with the plain language of section 102(b)(6) – which refers to the screening out of "an individual with a disability" *or* "a class of individuals with disabilities" – a (b)(6) claim does not require a showing that an entire class of disabled persons are similarly adversely affected. "[U]nder the ADA the standard may be applied to an *individual* who is screened out by a selection procedures because of a disability, as well as to a class of persons." EEOC Technical Assistance Manual at § 4.3 (emphasis in original); *see also Gonzalez v. City of New Braunfels*, 176

[21] Contrary to the Petitioner's assertions of boundless claims by persons "blaming" their disabilities for any prior misconduct, section 102(b)(6) claimants must demonstrate a nexus between their disability and the policy's impact: The challenged qualification standard must "screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, *on the basis of disability* . . . ." 29 C.F.R. § 1630.10 (emphasis added). In its section-by-section analysis, the EEOC explained that the Commission added the phrase "on the basis of disability" to clarify that "there must be a nexus between the exclusion and the disability." 56 Fed. Reg. 35,726, 35,731 (July 26, 1991). Accordingly, "[a] selection criterion that screens out an individual with a disability for reasons that are not related to the disability does not violate this section." *Id.* Additionally, even where the criteria does screen out for reasons related to disability, the criteria will not violate the Act if it is job-related and necessary. Here, the Respondent's past positive drug test is directly related to the disability of rehabilitated drug addiction, and the Petitioner failed to show job-relatedness and necessity.

F.3d 834, 839 (5th Cir. 1999) ("In the ADA context, a plaintiff may satisfy the second prong of his prima facie case [establishing a disparate impact] by demonstrating a adverse impact on himself rather than on an entire group.").

Accordingly, a broad range of evidence may be proffered to demonstrate that the challenged practice in fact functions to screen out the individual plaintiff on the basis of disability. A formal statistical showing is not required.[22]

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[22] As the EEOC explained: "It is not necessary to make statistical comparisons between a group of people with disabilities and people who are not disabled to show that a person with a disability is screened out by a selection standard. Disabilities vary so much that it is difficult, if not impossible to make general determinations about the effect of various standards, criteria and procedures on 'people with disabilities.' Often, there may be little or no statistical data to measure the impact of a procedure on any 'class' of people with a particular disability compared to people without disabilities." EEOC Technical Assistance Manual at § 4.3. The Appendix to 45 C.F.R. § 84.13 – the original Section 504 regulation upon which section 102(b)(6) is based – is in accord: "Revised § 84.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available. . . . Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of 'disproportionate, adverse effect' difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related." 45 C.F.R. pt. 84, app. A. The appendix to the Section 504 regulations was cited as authority by this Court in *Arline*, 480 U.S. at 280 n.5. Additionally, the ADA adopts as a floor the Rehabilitation Act's standards. 42 U.S.C. § 12201(a) ("Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under [the Rehabilitation Act] or the regulations issued by Federal agencies pursuant to such title.") (citation omitted).

While relevant evidence may include statistics, it may also include the experience of the plaintiff, expert and non-expert testimony about disabilities and their effects, and even common sense regarding the inevitable impact of particular neutral policies on persons with certain types of disabilities. Here, Respondent Hernandez's own uncontroverted testimony demonstrates that he was individually and inevitably screened out on the basis of disability by the Petitioner's inflexible qualification standards: his history of drug addiction was equivalent to, and compelled, the use of illegal drugs in the past, along with the corresponding positive drug test at work.

Additionally, a large body of data supports the somewhat obvious conclusion that rehabilitated illegal drug addicts are more likely to have personal histories of arrests, convictions, and job loss.[23] *Cf. New York City Transit Auth. v. Beazer*, 440 U.S. 568, 602-603 (1979) (critiquing statistics regarding percentages of black and Hispanic persons in public methadone programs, where figure revealed little

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[23] For example, in a large-scale study surveying more than 10,000 drug abusers admitted to approximately 96 drug treatment programs in 11 cities, nearly 58 percent had been arrested or sent to juvenile court for possession of drugs, a liquor law violation, or "drunk and disorderly." National Institute on Drug Abuse, *Drug Abuse Treatment Outcome Study (DATOS), 1991-1994* (Apr. 2000), intake 1 at 251 (response AG7_1), *at* http://www.icpsr.umich.edu/SDA12/SAMHDA/datos/codebook/22580036.htm. More than 80 percent had spent time in jail, prison, or a juvenile detention home; the top reason for detention was the use or possession of marijuana or other narcotics. *Id.* at 271, 272 (response AG 14 and AG15), *at* http://www.icpsr.umich.edu/SDA12/SAMHDA/datos/codebook/22588039.htm. Nearly 40 percent had had recent trouble getting or keeping a job due to drug or alcohol use, *id.* at 321 (response AH22), *at* http://www.icpsr.umich.edu/SDA12/SAMHDA/datos/codebook/22580046.htm, and a large proportion recently were out of work, *id.* at 319 (response AH19A), *at* http://www.icpsr.umich.edu/SDA12/SAMHDA/datos/codebook/22580046.htm.

about the racial composition of transit authority applicants and employees, and gave no information about participants in private programs); *but see id.* at 603 n. 29 (citing and quoting *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) ("a statistical showing of disproportionate impact [need not] always be based on an analysis of actual applicants")); *Dothard*, 433 U.S. at 330 ("reliance on general population data was not misplaced" where there was no reason to believe that characteristics of population at issue differed from national population).

When an addict such as Respondent becomes successfully rehabilitated, over time his or her personal history of any drug-related arrest, conviction, detention, or job loss fades into the past. However, even years into a successful recovery, that same individual remains vulnerable to being screened out by facially neutral employer policies, such as the one here, that automatically disqualify applicants based on such historical criteria. In a recent survey, 48 percent of California employers stated that they would never hire anyone with a felony drug conviction.[24] Given the ADA's plain language, this group of disabled persons must be permitted to challenge unnecessary neutral policies that prevent them from securing employment.

B. To Comply With The ADA, Such Policies Must Be Job-Related And Consistent With Business Necessity.

The ADA permits a selection criterion that "screens out or tends to screen out" an individual with a disability only if it "is shown to be job-related for the position in question and is consistent with business necessity." 42

[24] Employers Group, *Employment of Ex-Offenders: A Survey of Employers' Policies and Practices* 6 (Apr. 12, 2002), *at* http://www.sfworks.org/docs/Employer%20survey%20report.pdf.

U.S.C. § 12112(b)(6); *see also* 42 U.S.C. § 12113(a) ("It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out of tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity . . .."). "[A]n employer bears the burden of proving that a particular hiring policy is 'job-related' and 'consistent with business necessity.'" *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996).

Business necessity must "not [be] confused with mere expediency." *Bentivegna v. U.S. Dep't of Labor*, 694 F.2d 619, 622 (9th Cir. 1982). To meet the business necessity standard, the challenged practice must not only foster the identified business interest, "but must be essential to that goal." *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975); *see also Morton v. U.P.S.*, 272 F.3d 1249, 1258 (9th Cir. 2001) ("[A]n employer may require disabled employees as well as others to meet an across-the-board qualification standard if it can establish the stringent elements of the business necessity defense."); *Belk v. Southwestern Bell Co.*, 194 F.3d 946, 951 (8th Cir. 1999) ("An employer urging a business necessity defense must validate the test or exam in question for job-relatedness to the specific skills and physical requirements of the sought-after position."); *Griggs v. Duke Power*, 401 U.S. 424, 432 (1971) (in the context of Title VII, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.").

To evaluate the business necessity of a facially neutral hiring policy such as the one challenged here, courts must examine the relationship, if any, between the disqualifying characteristic and the nature and functions of the particular job. Thus, in *Hendricks-Robinson*, 154 F.3d

685, 699 (7th Cir. 1998), the Seventh Circuit found that a neutral requirement of "physical fitness" was not related to the job requirements of all of the varied jobs at the defendant company. Similarly, in *E.E.O.C. v. Exxon*, the Fifth Circuit noted that the question of whether a general rule of excluding persons who had been treated for substance abuse was necessary to meet the proffered business interest in safety would vary depending upon the particular job, and that courts should therefore consider the potential hazard posed by the position at issue. 203 F.3d 871, 875 (5th Cir. 2000).[25] Notably, while the Petitioner's policy applied to *all* jobs, the policy at issue in *Exxon* applied only to "certain, safety-sensitive, little-supervised positions." 203 F.3d at 872.[26]

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[25] *See also,* EEOC Technical Assistance Manual at § 4.1 ("An employer can fire or refuse to hire a person with a past history of illegal drug use, even if the person no longer uses drugs, in specific occupations, such as law enforcement, when an employer can show that this policy is job-related and consistent with business necessity. . . . However, even in this case, exclusion of a person with a history of illegal drug use might not be justified automatically as a business necessity, if an applicant with such history could demonstrate an extensive period of successful performance as a police officer since the time of drug use.").

[26] Under Title VII, courts have similarly considered the particular job at issue, and any special security or safety concerns, when evaluating business necessity. *See Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1296-97 (8th Cir. 1975) (disqualification for past conviction not required by employer's generalized concerns regarding theft, employee's credibility, and possible employer liability where "no consideration is given to the nature and seriousness of the [past offense] in relation to the job sought"); *Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977) (affirming injunction permitting consideration of criminal convictions as factor in hiring so long as employer took into account "the nature and gravity of the offense or offenses, the time that [has] passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied"); *Gregory v. Litton Sys.*, 316 F. Supp. 401, 402-03 (C.D. Cal. 1970) (no business necessity where no evidence that persons with particular arrest record "can be expected, when employed, to perform less efficiently or less honestly than other employees"); *Reynolds v. Sheet Metal Workers Local 101*, 498 F. Supp. 252, 973 (D.D.C. 1980) (inquiries about arrest records with adverse impact must be eliminated where not validated as job-related); *Richardson v. Hotel Corp. of America*, 332 F. Supp. 519, 521 (E.D. La. 1971) (noting that past criminal record alone provides no basis for predicting future crime, but upholding policy of excluding persons with serious convictions for security-sensitive positions); *Davis v. City of Dallas*, 777 F.2d 205, 226 (5th Cir. 1985) (upholding employer's policy that police officer applicants not have more than three moving traffic violations in the preceding year, where employer demonstrated that past moving violations are predictor of future accidents, and hiring criteria justified by public safety and interest in safe operation of police cars).

[27] *See also Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 699 (7th Cir. 1998) ("Even when 'physical fitness' is a selection criterion that is related to an essential function of the job, however, it 'may not be used to exclude an individual with a disability *if that individual could satisfy the*

Here, the employer asserts such generalized and non-job-specific concerns as preserving institutional memory, preventing the repetition of prior hiring mistakes, and eliminating "substantial baggage" and other "unnecessary complications" from the workplace. Petitioner's Opening Brief at 27. However, the Petitioner has declined to undertake its required showing that the no-rehire policy is actually essential to those stated interests. *See Hernandez*, 298 F.3d at 1037 n.19 (noting that the employer failed to raise a business necessity defense); *see also Teahan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511, 521 (2d Cir. 1991) ("[A] defendant will bear a heavy burden in attempting to show that freedom from past substance abuse, in and of itself, is an essential job-related requirement"); *Nisperos v. Buck*, 720 F. Supp. 1424, 1428-29 (N.D. Cal. 1989) (plaintiff's use of illegal drugs and related arrest alone did not disqualify him from employment as an INS attorney).

Additionally, even if an employer can demonstrate that the qualification standard is required by business necessity, to prevail it would also have to demonstrate that achieving that standard "cannot be accomplished by reasonable accommodation." 42 U.S.C. § 12113(a).[27]

Further, the plaintiff may yet demonstrate that alternative employment practices exist that satisfy the employer's business needs without causing the same adverse impact. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971). Here, the Petitioner could easily draft and implement a policy that furthers equally its stated business interests without screening out qualified individuals with disabilities.[28] In considering alternative policies that do not exclude rehabilitated drug addicts from employment opportunities, the Petitioner is free to utilize all of the section 104 options, such as drug testing and workplace rules.

III. THE ADA CONTEMPLATES THE PROVISION OF REASONABLE ACCOMMODATIONS TO APPLICANTS WITH PAST AND PERCEIVED DRUG ADDICTIONS.

The Respondent focused upon a disparate treatment theory of discrimination below, and did not brief a reasonable accommodation theory in the trial or appellate courts. Accordingly, this Court should decline to reach the issue of whether the Respondent was entitled to any reasonable accommodation.

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criterion with the provision of a reasonable accommodation.'") (quoting and adding emphasis to 29 C.F.R. pt. 1630, app. § 1630.10); *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1086, 1086 n.8 (10th Cir. 1997) ("A disabled employee may be held to any performance criteria that are job-related and consistent with business necessity, so long as the disabled employee is given the opportunity to meet such performance criteria by reasonable accommodation.").

[28] In fashioning such an alternative policy, an employer need only consider any unnecessary impact on protected individuals – those with a past but rehabilitated, or perceived, disabling drug addiction.

To be clear, however, the ADA contemplates the provision of reasonable accommodations to applicants and employees with rehabilitated drug addiction. Section 102(b)(5)(B) defines discrimination to include the denial of an employment opportunity "based on the need of such covered entity to make reasonable accommodation to the physical or mental impairment of the . . . applicant." 42 U.S.C. § 12112(b)(5)(B). Similarly, section 102(b)(5)(A) states that discrimination includes "not making reasonable accommodations to the known mental and physical limitations of an otherwise qualified individual with a disability . . .." 42 U.S.C. § 12112(b)(5)(A).

Persons who are protected due to their rehabilitated drug addiction have a present impairment.[29] Additionally, such persons have, by definition, past substantial limitations and frequently continue to experience present limitations.[30] These disabled individuals are entitled to seek the modest accommodations they may need to work successfully despite their impairments and limitations. As the EEOC has noted, "[t]he ADA may require consideration of reasonable accommodation for a drug addict who is rehabilitated and *not* using drugs . . .. For example, a modified work schedule, to permit the individual to attend an ongoing self-help program, might be a reasonable accommodation for such an employee." EEOC Technical Assistance at § 8.7; *see also*

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[29] *See* S. Rep. No. 116 at 22 (term "impairment" includes drug addiction); H.R. Rep. No. 485(II), at 51 (same); H.R. Rep. No. 485(III) at 28 (same); 45 C.F.R. pt. 84, app. A (same).

[30] Only one of the three substantive provisions in Title I referencing "reasonable accommodation" – 42 U.S.C. § 12112(b)(5)(A) – requires that the accommodation be made to the "physical or mental limitations" of the individual. *Compare* 42 U.S.C. §§ 12112(b)(5)(B), 12113(a). Further, given the definition of disability as including a *record* of a substantially limiting impairment, 42 U.S.C. § 12102(2)(B), the temporal scope of the "physical or mental limitations" referenced in section 102(b)(5)(A) is not unambiguously limited to the present.

House Comm. on Conference, H.R. Rep. No. 596, 101st Cong., 2d Sess., at 87 (1990) ("many people continue to participate in drug treatment programs long after they have stopped using drugs illegally"). As this Court has recently acknowledged, accommodations may be sought even if they require modifications of an employer's workplace rules.[31]

Several circuits have held that employers are not obligated to provide reasonable accommodations to applicants or employees who do not have "actual" disabilities, but who are protected by the Act due to their perceived disability.[32] Most of these courts acknowledge that the plain language of the statute does not dictate such a result,[33] but nevertheless conclude that accommodating

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[31] *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 398 (2002) ("Many employers will have neutral rules governing the kinds of actions most needed to reasonably accommodate a worker with a disability. . . . [T]he nature of the 'reasonable accommodation' requirement, the statutory examples, and the Act's silence about the exempting effect of neutral rules together convince us that the Act does not create any such automatic exemption [from the obligation to modify neutral rules]."); *see also* 42 U.S.C. § 12111(9)(B) ("The term 'reasonable accommodation' may include . . . modifications of . . . policies").

[32] *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232-33 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Texas State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998); *see also Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148 n. 12 (3d Cir. 1998) (en banc); *cf. Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996) (allowing "regarded as" plaintiff to proceed); *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 166 (E.D.N.Y. 2002) (concluding that employers have a duty to accommodate in "regarded as" cases).

[33] *See, e.g., Kaplan*, 323 F.3d at 1232 (noting that "on its face" the ADA does not differentiate between the three alternative prongs of the definition of disability with regard to the reasonable accomodation requirements); *Deane*, 142 F.3d at 148 n12 (discussing argument that plain language of statute requires reasonable accommodation for "regarded as" plaintiffs); *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 196 (3d Cir. 1999) (noting that the ADA "does not appear to distinguish

persons without actual disabilities cannot be required, as such a rule would lead to "bizarre results," *Weber v. Strippit, Inc.*, 186 F.3d 907, 916 (8th Cir. 1999).

These Circuit court decisions are incompletely reasoned. First, they fail to appreciate that persons with "record of" or "perceived" disabilities may still have present impairments and/or limitations.[34] Thus, a rehabilitated drug addict may require modest accommodations such as a modified schedule to attend self-help meetings. A person with cancer in remission may require time off for a periodic screening to ensure that the cancer has not returned.

Second, persons with perceived or past disabilities often face obstacles to employment caused *not* by their functional limitations, but by their *status* as persons with disabilities. Thus, a person who is protected due to a history or perception of disability may require modest modifications to overcome these sorts of status-based hurdles. *See, e.g., Jacques v. DiMarzio, Inc.*, 200 F. Supp. at 166-68 (reasonable accommodation may be necessary to enable persons perceived as disabled to overcome prejudice); *Arline*, 480 U.S. at 284 ("Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."). The Respondent's need for an individualized assessment of his application falls

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between disabled and 'regarded as' individuals in requiring accommodation"); *Jacques*, 200 F. Supp. 2d at 166 ("plain language of the ADA" supported conclusion that reasonable accommodations should be available when the plaintiff is "regarded as" disabled).

[34] An individual can be protected by virtue of having a "record of" disability, or by being "regarded as" having a disability, while still experiencing a present impairment or present limitations. *See* 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(k), (*l*).

within this category.[35] Including these accommodations is entirely consistent with the stated purposes of the statute as well as its text.

CONCLUSION

The Court has granted certiorari on a question that has the potential to affect all ADA cases brought under a "screen out" theory of discrimination, as well as all situations in which persons with past or perceived disabilities seek reasonable accommodations to their impairments. At the same time, the Respondent has pursued below a theory of garden-variety disparate treatment, and has waived any disparate impact or reasonable accommodation claims. Given this procedural posture, this Court should focus on whether the Respondent created a triable issue of fact on his claim of intentional discrimination. Before going beyond this narrow question, the *amici* urge this Court to carefully consider the universe of claims that are encompassed by the text of sections 12112(b)(6), 12112(b)(5)(A), and 12112(b)(5)(B), and the underlying purposes of these provisions. The important questions which surely will arise in the context of such claims are not properly or fairly decided here.

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[35] *See PGA Tour v. Martin*, 532 U.S. 661, 688 (2001) ("Petitioner's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. . . . To comply with [Title III], an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration."); *Arline*, 480 U.S. at 287 ("To answer this question [whether employee is otherwise qualified] in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact."); S. Rep. No. 116 at 31 ("fact-specific case-by-case approach to providing reasonable accommodations is generally consistent with interpretations of this phrase under . . . the Rehabilitation Act of 1973"); H.R. Rep. No. 485(II) at 62 (same).

Respectfully submitted,

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APPENDIX OF AMICI CURIAE IN SUPPORT OF RESPONDENT

The **American Association of People with Disabilities ("AAPD")** is a national membership organization promoting the political and economic empowerment of children and adults with disabilities in the U.S. Founded on the fifth anniversary of the ADA, AAPD has a strong interest in full enforcement and implementation of the ADA to ensure equal employment opportunities for individuals with disabilities.

The **Association on Higher Education And Disability ("AHEAD")** is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities, including employment. Its membership includes approximately 2,000 institutions (including colleges, universities, not-for-profit service providers, and standardized testing organizations, professionals, and college and graduate students planning to enter the field of disability practice). Many of its members are actively engaged in assuring ADA compliance and in providing reasonable accommodations to both students and employees at institutions of higher education and in high-stakes standardized testing. In addition, AHEAD members actively work with students in establishing vocational plans and job readiness. AHEAD publishes numerous resources on the implementation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 by post-secondary educational institutions.

The **Bazelon Center for Mental Health Law** is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal

opportunities for individuals with mental disabilities. Much of the Center's work involves efforts to remedy disability-based discrimination in employment and other areas through enforcement of the ADA.

The **Depression and Bipolar Support Alliance ("DBSA")** is the leading patient-directed national organization focusing on the most prevalent mental illnesses - depression and bipolar disorder. Studies indicate that there may be 20 to 35 million persons with depression and 2.5 million to 10 million people with bipolar disorder. DBSA was founded in 1985 and is based in Chicago. DBSA's mission is to improve the lives of people living with mood disorders. This not-for-profit organization fosters an environment of understanding about the impact and management of these life threatening illnesses by providing up-to-date, scientifically based tools and information, written in easy to understand language. DBSA has more than 1,000 peer-run support groups across the country. Assisted by a Scientific Advisory Board, comprised of the leading researchers and clinicians in the field of mood disorders, DBSA supports research to promote more timely diagnosis, to develop more effective and tolerable treatments and to discover a cure. The organization works to ensure that people living with mood disorders are treated equitably. DBSA's mission firmly embraces increasing the public's awareness that depression and bipolar disorder are widespread and real, treatable medical illnesses. Precisely because these conditions do respond so readily to medications and standard treatments, a patient's employment opportunities should not be prejudiced by his or her pre-treatment inabilities. Accordingly, a no-rehire policy significantly and unfairly penalizes this segment of our society, by inflexibly and illogically barring those with these eminently treatable medical conditions from appropriately resuming legitimate employment. Thus, a failure to uphold the Court of Appeal's decision would needlessly subject millions of otherwise

qualified working Americans to both the specter and the reality of stigmatizing job discrimination today and in the future.

The **Disability Rights Education and Defense Fund, Inc. ("DREDF")**, based in Berkeley, California, is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

The **Epilepsy Foundation®** is the sole national nonprofit health organization dedicated to advancing the interests of the more than two million people with epilepsy and seizure disorders nationwide. People with epilepsy continue to be discriminated against in all aspects of life, particularly employment, because of the stigma associated with the condition and misperceptions of seizure-related behavior. Indeed, people with epilepsy are often terminated or denied employment opportunities because of seizure-related behavior and facially neutral policies such as the one at issue in this case. For example, a person with epilepsy may be terminated because of property damage caused by a seizure and later denied the opportunity to reapply for a job with the same company. The Epilepsy Foundation has, since its inception, sought to end such discrimination through advocacy, education and supporting the development of laws, such as the ADA, that protect individuals from discrimination based on these stereotypes and fears.

The **International Association of Psychosocial Rehabilitation Services ("IAPSRS")** is an international coalition of agencies, practitioners, families, and persons with psychiatric disabilities. The purpose of IAPSRS is to help advance the role, scope, and quality of services designed

to facilitate the community readjustment of people with psychiatric disabilities. IAPSRS seeks to improve the quality of psychosocial rehabilitation services and resources, to strengthen the role of community-oriented psychosocial rehabilitation within the mental health services delivery systems, and to facilitate the coordination and continuity of programs.

The Legal Aid Society – Employment Law Center ("The LAS-ELC") is a public interest law firm that advocates on behalf of the workplace rights of individuals with disabilities and other under-represented communities. Since 1970, the The LAS-ELC has represented clients in cases covering a broad range of employment issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin. The LAS-ELC represents clients faced with discrimination on the basis on their disabilities, including those with claims brought under the Americans with Disabilities Act. The LAS-ELC also files *amicus* briefs in cases of importance to disabled persons.

The **National Association for the Deaf**, whose members are deaf and hard-of-hearing adults, parents of deaf and hard-of-hearing children, and professionals, works to safeguard the civil rights of deaf and hard-of-hearing Americans.

The **National Association of Protection and Advocacy Systems ("NAPAS")** is the membership organization for the nationwide system of protection and advocacy ("P&A") agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.

NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A network. This case is of particular interest to NAPAS because P&As are committed to challenging discriminatory policies and practices that exclude individuals with disabilities from the workplace.

The **National Council on Independent Living ("NCIL")** is a membership organization that advances the independent living philosophy and advocates for the human rights of, and services for, people with disabilities to further their full integration and participation in society. NCIL was established in 1982 and is the leading national, cross-disability, grassroots organization run by and for people with disabilities.

The **National Employment Lawyers Association ("NELA")** and its 67 state and local affiliates have a membership of more than 3,000 attorneys, and NELA is the country's only professional membership organization made up of attorneys who regularly represent employees in labor, employment, and civil rights disputes. As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace, and has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the Federal appellate courts regarding the proper interpretation and application of employment discrimination laws. For example, NELA participated as *amicus* in *Clackamas Gastroenterology Associates, P.C. v. Wells,* No. 01-1435 (April 22, 2003), and *University of Alabama at Birmingham, Board of Trustees v. Garrett,* 531 U.S. 356 (2001). NELA members have represented thousands of individuals in this country who are victims of employment discrimination based on disability status, and have brought numerous cases under the Americans with Disabilities Act. As such, NELA has a compelling interest in

ensuring that the goals of the ADA are protected and fully realized.

For over thirty years, the **National Health Law Program ("NHeLP")** has engaged in legal and policy analysis on behalf of low income and working poor people, people with disabilities, the elderly, and children. In its work, NHeLP represents individuals who are experiencing disabling conditions affecting work and the receipt of health insurance benefits. The Program also sponsors research and writing on laws which have been enacted to benefit our client groups. As such, NHeLP has considerable interest in the outcome of this case.

Established in 1909, the **National Mental Health Association ("NMHA")**, with its more than 340 affiliates, is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research, and services. NMHA envisions a just, humane and healthy society in which all people are accorded respect, dignity, and the opportunity to achieve their full potential free from stigma and prejudice.

The **National Mental Health Consumers' Self-Help Clearinghouse** is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. The Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

The **Western Law Center for Disability Rights ("WLCDR")** is a Los Angeles, California-based non-profit organization that protects and enforces the civil rights of people with mental and physical disabilities. Since 1975, the WLCDR has handled disability rights cases, including numerous employment, housing and access cases under California and federal civil rights laws. The WLCDR provides much needed assistance to persons with disabilities through litigation, mediation, education and meaningful referrals to other agencies.

No. 02-749

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IN THE

Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE BETTY FORD CENTER, AMERICAN SOCIETY OF ADDICTION MEDICINE, NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, NADDAC/THE ASSOCIATION FOR ADDICTION PROFESSIONALS, NATIONAL ASSOCIATION OF ADDICTION TREATMENT PROVIDERS, AMERICAN ASSOCIATION FOR THE TREATMENT OF OPIOID DEPENDENCE, INC., NATIONAL ASSOCIATION ON ALCOHOL, DRUGS AND DISABILITY, STATE ASSOCIATIONS OF ADDICTION SERVICES, JOHNSON INSTITUTE, LEGAL ACTION CENTER, AND INTERNATIONAL NURSES SOCIETY ON ADDICTIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST*

As described more fully in the Appendix, *Amici Curiae* are providers of treatment to people with addictions to alcohol and other drugs, as well as national associations of treatment professionals and others committed to combatting discrimination based on prior addiction experience. As part of our efforts to make recovery more attainable for people with chemical dependency problems, *Amici* have long supported research into the causes and treatment of addiction and played a leadership role in educating elected officials – and the public – about the realities of addiction.

Although, as we can attest, addiction can be a devastating, disabling condition, our experience also establishes – and a vast body of empirical evidence confirms – that it is a *treatable* one. Millions of Americans have overcome problems with chemical dependency and make vital contributions to the Nation's economy and its civic life.

We can also attest, however, that despite this demonstrable reality, individuals who have past experience with addiction regularly confront negative and inaccurate assumptions – *e.g.*, that their prior drug use is indicative of a "character defect" that makes them untrustworthy or dangerous. This pervasive prejudice and misunderstanding complicates the treatment process and operates, needlessly, to deprive the workforce of the contributions of many capable people.

As we describe herein, these realities were fully apparent to Congress when it enacted the Americans With Disabilities Act in 1990. Rejecting calls to limit that statute's protections to individuals with more "sympathetic" disabilities, Congress determined that there is no inconsistency between the aims of protecting individuals with a history of addiction against irrational exclusion and permitting employers latitude to address the *use* of drugs.

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*This brief was not authored in any part by counsel for a party, and no one other than *Amici* made a monetary contribution to its preparation or submission. Both parties have consented to its submission.

Amici are concerned that Petitioner in this case (supported by many of the Nation's largest employers) is urging the Court to construe the ADA in a way that would effectively nullify this important promise: that an individual's *history* of disabling addiction will not be permitted to define his or her lifetime employment opportunities. Because the text does not permit that interpretation, and because of the broad, adverse effects its adoption would have on the lives of the individuals we serve, *Amici* submit this Brief.

SUMMARY

In enacting the ADA, Congress acknowledged that, as with other disabling conditions, addiction to alcohol and other drugs is the subject of broad public misunderstanding and that, like other persons with disabilities, individuals who have experienced chemical dependency face widespread discrimination. Congress also forcefully recognized what many Americans still do not: that addiction is a treatable condition.

Consistent with these judgments, the ADA and its implementing regulations place addiction among the physical and mental impairments that trigger anti-discrimination protection, and the statute's text includes provisions specifically intended to assure that individuals who pursue treatment are protected against adverse action – and that employers' legitimate powers to address workplace drug *use* not become a means for closing off opportunity to those with a history of addiction.

Petitioner and its *Amici* insist that these statutory protections are not implicated in this case, because Raytheon's "real reason" for denying Mr. Hernandez's employment application was an (unwritten) company rule of lifetime ineligibility for applicants whose prior misconduct led to dismissal. Without disputing that such a policy would automatically (and perpetually) exclude an individual who has "completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs," *see* 42

U.S.C. § 12114(b)(1), and could do so based on drug use that occurred while in the grips of an addiction, Petitioner nonetheless urges the Court to pronounce it lawful *per se*.

As we explain at the outset, the record in this case raises serious questions as to whether the "policy" Petitioner would have the Court approve actually accounted for the employment action at issue. Before the EEOC, the Company essentially admitted that Respondent's application had been denied "based on" his of history drug use and on its perception that he had not overcome addiction, and the record discloses enough ambiguities and inconsistencies in the later-substituted "unwritten- policy" explanation that the decision below, holding summary judgment inappropriate, could readily be affirmed on that basis alone.

But even if application of the "policy," as described by Petitioner in this Court, were the "real reason" why Raytheon denied Respondent employment, its further contention, that such a policy should – without any showing of business necessity – be adjudged non-discriminatory as a matter of law must be rejected.

The burden of Petitioner's argument is that a lifetime hiring bar is not "discriminatory" within the meaning of the statute, (a) so long as it is triggered by the applicant's past use of drugs (*i.e.*, a past "violation" of a "rule" against having "drugs in [one's] system") rather than his past drug addiction – and (b) so long as it applies "the same" to individuals recovering from chemical dependency and to those, without any history of disability, previously terminated for "other" workplace misconduct.

But this argument reflects a serious misreading of the governing statute. The ADA's text makes clear that its prohibition against "discrimination" is not confined to the one or two "types" referenced in Petitioner's Brief. Rather, the statute's language expresses Congress's recognition that many of the practices that limit most severely the opportunities of individuals with disabilities – including those with a record of disabling addiction – do so

unintentionally. *See, e, g.*, 42 U.S.C. § 12112(b)(3)(A),(5),(6). Accordingly, Congress directed that even practices that only "tend to" screen out applicants with disabilities – not to mention the one defended here, which invariably excludes members of the protected class based on a defining trait of their disability – are lawful only if justified by business necessity. *See* 42 U.S.C. § 12112(b)(6).

Against that background, arguments that its policy does not discriminate "because of disability" because it focuses on "conduct" are unavailing. *It is axiomatic* that the class whom Congress undertook to protect – those with a history of addiction who have "completed a supervised drug rehabilitation program and [are] no longer engaging in the illegal use of drugs," 42 U.S.C. § 12114(b)(1) – will have, at *some past point*, committed the disqualifying "offense" of having "drugs in [their] system," and though Petitioner strains to present Hernandez's exclusion as triggered by some aggravating factor, such as "coming to work" or "working with missiles," Petitioner's own description is that a person's prior drug use while addicted will lead, "invariably," Br. at 2, to lifetime employment ineligibility.

Nor is Hernandez's acknowledgment that his earlier *termination* was permissible under the ADA of independent – let alone dispositive – significance in deciding whether a *no-hiring* policy is lawful. Congress explicitly provided that the latitude given employers to deal with employees' (and applicants') current drug use, *see* § 12114(a), *not be* construed as conferring authority to deny opportunity to individuals "no longer engag[ing]" in such activity, *id.* § (b)(1). Indeed, the primary rationale for this sharp textual distinction is that reasons that might legitimately support a summary-dismissal-for-drug-use policy do not apply when deciding whether to hire an individual who used drugs in the past but has overcome addiction.

Nor is it correct that the policy is "non-discriminatory" *per se* because it treats past drug use by an individual recovering from an addiction "the same" as "other" past

"aggravated workplace misconduct," unrelated to a history of disability. The text of the ADA forecloses any argument that facial even-handedness is the same as non-discrimination – and under any definition of discrimination, an employer's *reasons* for applying a policy are significant. To the extent, for example, such a policy rests on belief that hiring a person who used drugs in the course of a past, disabling addiction is "no different from" "giving [a] thief another opportunity to steal," it would seem to evince precisely the stereotypical thinking about addiction that Congress was determined not to tolerate.

Finally, although the ADA does not prohibit employers from adopting hiring exclusions that are uninfected by stereotypical judgments and supported by some genuine business necessity, the record in this case obviously cannot support summary judgment *for Petitioner* on that basis. The Briefs for Petitioner and *Amici* proffer numerous generic rationales for policies like Raytheon's, but, as we show, several of these – such as safety promotion and deterrence – are patently inconsistent with what the evidence shows this employer's actual practices to be, and others – including the claimed "fairness" of a blanket exclusion, relative to individualized consideration – are of doubtful legitimacy, let alone sufficiency, under the ADA. If anything, these attempts at justification (offered, paradoxically in the service of an argument that no explanation should be required) *highlight* the importance for further fact-specific inquiry.

I. The Decision Denying Petitioner Judgment As A Matter of Law May Be Affirmed On Narrow Grounds

Although the decision below relied – as did the parties – on the *McDonnell Douglas* framework, this case is plainly not the typical one where a court must decide between a plaintiff's assertion that her employer acted impermissibly based on some protected trait and the defendant's answer that its decision had nothing to do with her membership in

the statutorily protected class.

As we explain below, even if Raytheon's "policy" explanation is *credited*, there is no dispute that Respondent's drug use while previously addicted played a role in the employment decision, and courts in similar cases have held that the question of unlawful "discrimination" cannot be resolved definitively without considering the business need, if any, served by excluding the disabled employee. *See generally Tehan v. Metro-North Commuter R. Co.*, 951 F.2d 511 (2d Cir. 1991). But even under the *McDonnell Douglas* framework, the record raises enough doubts about the "policy" Petitioner asserts to be the "real reason" for denying Hernandez employment to make summary judgment inappropriate. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2001).[1]

First, the employer unequivocally asserted – in its official explanation to the EEOC – that its rejection of Hernandez's application was "*based on* [his] demonstrated drug use while previously employed *and* the complete lack of evidence indicating successful drug rehabilitation," J.A.

[1]Although *Reeves* concerned application of Fed. R. Civ. P. 50, it affirmed that "'the standard for granting summary judgment mirrors the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" 533 U.S. at 150 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986)).

To the extent the Court conducts the *McDonnell Douglas* analysis, it must accept that Respondent made out a *prima facie* case. The appeals court ruled both that Hernandez had a "record of disability" and that there were triable issues as to whether he was "otherwise qualified" when he applied in 1994. Raytheon did not seek review of those conclusions, nor are its arguments on these points, *see* Br. at 29 & n.5., fairly subsumed within what its certiorari petition identified as the question presented.

Petitioner's complaints notwithstanding, the standard applied by the appeals court, requiring Respondent to show that "his employer * * * refused to rehire him because of his disability," 298 F.3d at 1033, as part of his *prima facie* case, seems *more* demanding than *McDonnell Douglas* contemplates. *See Texas Dep't Comm. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (describing plaintiff's "burden as 'not onerous'"); *Ennis v. National Ass'n of Business & Educ. Radio, Inc.*, 53 F.3d 55, 57-58 (4th Cir. 1995) (noting need to modify fourth prong in ADA cases).

19a-20a (emphasis added). To be sure, that submission also adverted to Raytheon's "right," *id.*, to reject applicants whose employment had previously been terminated, but it did not reference a "policy" of doing so *automatically*. On the contrary, if denial were non-discretionary, one avowed "bas[is]" for its decision, the alleged insufficiency of evidence of "successful drug rehabilitation," would have been wholly beside the point.

Moreover, the "policy" defended here is, at most, "unwritten" – the only evidence attesting to it being the deposition of Raytheon's employee, Bockmiller, who is not the sort of "disinterested witness," *see Reeves*, 533 U.S. at 151, whose testimony a court deciding a Rule 56 motion must credit. And that testimony can be described as "undisputed," Br. at 30, only by ignoring its inconsistency with the *Company's own* prior explanation. *See Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000) ("when a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual"); *accord EEOC. v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994); *EEOC. v. Sears*, 243 F.3d 846, 852 (4th Cir. 2001); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 931-32 (7th Cir. 2001); *Holiday v. Chattanooga*, 206 F.3d 637, 647 (6th Cir. 2000).[2]

And "[a]part from the late appearance of [Raytheon's] current explanation, there is additional evidence from which a factfinder could infer that it is unworthy of belief," *Sears*, 243 F.3d at 853. An inference of pretext is surely more compelling when, as here, the *initial* explanation was essentially an admission of discrimination, *see* J.A. 93a (EEOC determination of "reasonable cause" for finding ADA violation) – and when the "policy" belatedly asserted to support the decision was never committed to writing. *See,*

[2]Respondent surely did *dispute* Bockmiller's testimony, and, in fact, identified some basis for disbelieving it. Her testimony, for example, that she remembered Hernandez's application but "did not recall" seeing the letter concerning Hernandez's Alcoholics Anonymous participation – which apparently was forwarded along with it – was suspect. J.A. 53a-54a.

e.g., *Piraino v. Int'l Orientation Resources, Inc.* 84 F.3d 270 (7th Cir. 1996); *Sarsha v. Sears, Roebuck & Co.* 3 F.3d 1035 (7th Cir. 1993); *Dunning v. National Indus., Inc.*, 720 F. Supp. 924, 931 (M.D. Ala. 1989) ("[u]nwritten policies, as opposed to written policies, can be easily turned into tools of discrimination").

A claim of unwritten policy deserves less credence when made by a large company – which, the record shows, developed highly reticulated, written policies concerning other, presumably less pressing matters (such as the consequences for future *temporary* employment of a positive drug test by a *temporary* employee), and where no mention of the "policy" was made by an individual (Medina) whose familiarity with Company practices could be presumed.

Indeed, significant questions persist about the contours of the "unwritten" policy. Thus, while the Company depicts its rule as applying "the same" to individuals who resign "in lieu of termination," Br. at 6, as to those who are dismissed, there is no evidence, apart from self-serving testimony, to support that assertion – nor any that employees were aware that "resigning" would have that consequence (an odd gap, in view of the deterrent benefits claimed for the lifetime rehiring ineligibility "policy," *see infra*).[3] Similarly, that the Company's *written* policies address drug use (including sanctions therefore) distinctly from other "misconduct," *see* J.A. 81a-86a (discussing Policy 3-0-17), is further reason to doubt the assertion that a unitary *unwritten* "rule" governs all re-hiring decisions.

There are also inconsistencies concerning what triggers the policy. Although Raytheon insists here that "[t]he drug test and its results were not the violation," Br. at 17, the EEOC submission unambiguously indicated that Hernandez

[3]Although elsewhere in its brief, *see* Br. at 25 n.3, Raytheon emphasizes that Hernandez, as an "incumbent Hughes employee" * * * had notice of," Company rules, it offers no explanation why Respondent, whose employment dated back 25 years, applied for employment, unaware of any "policy" making him ineligible *per se*.

was "discharged for * * * **testing positive**" – and *did not* allege violation of rule provisions concerning "use of or being under the influence of illegal drugs during work time." J.A. 20a (emphasis by Petitioner). And contrary to the depiction of the no-hiring rule as unyielding, Raytheon actually stressed to the courts below that it had made Hernandez an offer of employment in 1999.[4] Finally, as we develop below, although Petitioner and *Amici* proffer a series of justifications for a hypothetical "blanket policy," these fit poorly with what the record shows this employer's actual practices to have been, and there is no evidence as to what purposes the *Raytheon* "policy" might actually have been intended to serve. *See* 298 F.3d at 1037 n.19; *cf. Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977) ("since there was no proof of any business necessity adduced with respect to the policies in question, [trial court] was entitled to assume no justification exists") (citation omitted).

II. Absent Proof of Business Necessity, A Policy That Excludes Individuals Who "No Longer" Use Drugs, Based On Prior Use Before Seeking Treatment For Addiction, Violates The ADA

A. The ADA Fully Protects Individuals With A History Of Addiction To Alcohol And Other Drugs From Discrimination On That Basis

The text, structure, and history of the Americans with Disabilities Act leave no doubt that Congress included individuals with a history of addiction to alcohol or illicit drugs within the statute's protections. *See* H.R. Rep. No. 101- 485(II) at 51 (1990) ("[t]he term [disability] includes * * * such conditions * * * as * * * drug addiction[] and alcoholism"); *accord* 28 C.F.R. § 35.104(1)(ii), (5)(iii); 42 U.S.C. § 12102(2)(B) (protecting individuals with a "record

[4]Although Petitioner's Brief presents termination and ineligibility for rehire as "invariable" consequences of ingesting drugs, Br. at 2, the record seems to indicate that Raytheon did not "invariably" terminate employees for the "offense" of "reporting to work with drugs in [their] system." *See* J.A. 81a (quoting policy).

of"disabling impairment).

> As the EEOC Technical Assistance Manual explains:
>
> Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addiction or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past drug addiction.

Id. § 8.5; *accord* U.S. D.O.J. Technical Assistance Manual § 2.5000 (1993)("The ADA protects * * * those with a record of [disabling] impairment. This protected group includes - A person * * * who has recovered from mental or emotional illness, drug addiction, alcoholism, heart disease, or cancer"); 135 Cong. Rec. S10774 (1989) (Kennedy) ("The act expressly includes individuals who have successfully completed a supervised drug rehabilitation program or who have otherwise been rehabilitated, and no longer use illegal drugs, within the definition of individuals with a 'disability.' Therefore, persons who are subjected to discriminatory actions because of a history of illegal drug use which they have successfully overcome are fully protected by the ADA").

Such protection is not novel to the ADA. *See id.* at S10801 (Simon) (describing ADA as "[r]etaining * * * crucial protections for persons who have recovered or are in treatment"). In the Comprehensive Alcohol Abuse and Alcoholism Prevention Treatment and Rehabilitation Act of 1970, Pub. L. 91-616, Congress provided that "no person may be denied or deprived of federal civilian employment or a federal professional or other license or right solely on the ground of * * * *prior* alcoholism," *id.* § 201; 42 U.S.C. § 290dd (b)(1), and, in 1977, the Attorney General issued a formal opinion concluding that the employment discrimination provisions of the Rehabilitation Act extended to chemically dependent individuals, 43 Op. Att'y Gen. 75 (1977). That conclusion was ratified in administrative regulations, *see* 42 Fed. Reg. 22,686 (May 4, 1977), and then by statutory amendment, Pub. L. 95-602; *see Nassau Sch. Bd. v. Arline*, 480 U.S. 273, 285 n.14 (1986); *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) (noting 42 U.S.C. § 12201(a), "directive * * * to construe the ADA to grant at least as much protection" as provided under the Rehabilitation Act). *See also* 24 C.F.R. § 100.201(a)(2) (identifying drug addiction and alcoholism as "impairment[s]" for purposes of Fair Housing Act prohibition against disability discrimination).

The decision to reaffirm this protection – which was reached after substantial debate, *see, e.g.*, 135 Cong. Rec. S10775 – reflects Congress's judgment (1) that individuals with a history of addiction are subject to the same sorts of arbitrary, unthinking prejudices that limit the full participation of other persons with disabilities; and (2) that, contrary to widely held assumptions, chemical dependency is a treatable condition. *See United States v. Southern Mgm't*, 955 F.2d 914, 923 (4th Cir. 1992) ("Congress intended to recognize that addiction is a disease from which, through rehabilitation efforts, a person may recover, and that an individual who makes the effort to recover should not be subject to * * * discrimination based on society's 'accumulated fears and prejudices' associated with drug addiction").

First, Congress repeatedly has acknowledged similarities between chemical dependency and other medical and psychiatric conditions that qualify as potentially disabling impairments under the ADA. *See* H.R.Rep. No. 100–711 at 22 (1988) (describing "former drug-dependent persons" as "[j]ust like any other person with a disability, such as cancer or tuberculosis); H.R. Rep. No. 91-1663 (1970) (alcoholism is "no more moral or immoral than tuberculosis or schizophrenia"). Congress has often referenced the judgments of leading public health and medical associations classifying addiction alongside other disorders or medical conditions, *see id.*, as have other branches of the federal government. *Linder v. United States*, 268 U.S. 5, 18 (1925); 43 Opp. Att'y Gen at 80 n.4.[5]

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[5]Although there has been long-running debate within the treatment community as to the utility of describing addiction as "a disease," there is

Even more clear are the similarities between the problems of prejudice and discrimination that confront individuals who have experienced addiction and those faced by other individuals with disabilities. The legislative findings supporting enactment of the ADA, *see* 42 U.S.C. § 12101(1)-(9), apply with full force to the experiences of many Americans who are or have been addicted to alcohol and other drugs. *See Arline*, 480 U.S. at 285 n.14 (Congress "understood the danger of improper discrimination against such individuals").

"Stereotypic assumptions," 42 U.S.C. § 12101(7), have long characterized attitudes toward individuals with addiction. In *Arline*, this Court cited discrimination based on a history of chemical dependence as the prototypical "discrimination on the basis of mythology," and "[m]any continue to see addicted people as immoral, weak-willed, or having a character defect," DISPELLING THE MYTHS Ch. 8; *see* H.R. Rep. No. 91-1663 (1970) (deploring "atmosphere of moral disapproval surrounding the entire subject, and the deplorable custom of treating alcoholics as sinners or criminals"); *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 342 (6th Cir. 2002) (summarizing evidence that treatment facility's clients' "status as recovering drug addicts was consistently equated with criminality," in affirming conclusion that actions based on these "unfounded

no dispute that addiction has biological and genetic *dimensions*. *See* NATIONAL ACADEMY OF SCIENCES, INSTITUTE OF MEDICINE, DISPELLING THE MYTHS ABOUT ADDICTION at 37 (reviewing evidence that addiction "causes long-lived alterations in the biochemical and functional properties of selected groups of neurons in the brain").

It has also been forcefully shown that many of the intuitive bases for distinguishing chemical dependency from other medical conditions do not withstand scrutiny. For example, although initial drug use is volitional, the etiology of many health problems – including hypertension, heart disease, and diabetes – also have important behavioral dimensions. *See* PHYSICIAN LEADERSHIP ON NATIONAL DRUG POLICY, POSITION STATEMENT (1997) 10-11 (noting that "no person eats fatty foods with the purpose of developing heart disease, * * * just as no drug user begins * * * with the hope of becoming addicted"); *see also infra* (noting similar treatment efficacy rates).

fears and stereotypes * * * violate[d] the ADA").[6]

Bound up with these prejudices concerning the nature of addiction are widely held, damaging – and false – assumptions that treatment is futile. As the Institute of Medicine observed, "[o]ne of the most enduring myths about addiction is that treatment for these disorders is ineffective." DISPELLING THE MYTHS 73. For example, a survey of *physicians* found that overwhelming numbers described treatment as "very effective" for disorders such as hypertension (86 percent) and diabetes (69 percent), and almost none viewed treatment as "very effective" for alcohol dependence (4 percent) or illicit drug dependence (2 percent), Nat. Center on Alcohol & Substance Abuse, *Missed Opportunity: National Survey of Primary Care Physicians and Patients on Substance Abuse* (May 2000), data establishes that treatment effectiveness rates for these diverse conditions are actually comparable. *See* C. O'Brien & A. McLellan. "Myths about the Treatment of Addiction," 347 THE LANCET 237-40 (1996).[7]

These attitudes and misunderstandings have led to widespread, documented "[d]iscrimination against individuals with [past addiction] * * * in such critical areas as employment [and] housing," 42 U.S.C. § 12101(3). *See* Peter D. Hart & Assocs, "Faces of Recovery" (2001) (one in four respondents in nationwide survey of recovering individuals reported personally experiencing employment discrimination and one in five reported fear of being fired or

[6] *Cf.* Pet Br. at 30 (alluding to Respondent's "checkered past").

[7] Literally hundreds of outcome-focused studies, many conducted by the federal and State governments, establish the broad effectiveness of treatment. *See, e.g.*, U.S. SUBSTANCE ABUSE & MENTAL HEALTH ADMIN., THE NATIONAL TREATMENT IMPROVEMENT EVALUATION STUDY (1997); NATIONAL ASS'N OF STATE ALCOHOL & DRUG ABUSE DIRECTORS, TREATMENT WORKS: A REVIEW OF 15 YEARS OF RESEARCH FINDINGS ON ALCOHOL AND OTHER DRUG ABUSE TREATMENT OUTCOMES (1990); C. Marwick, *Physician Leadership on National Drug Policy Finds Addiction Treatment Works*, 279 JAMA 1149 (1998) (reporting analysis of more than 600 peer-reviewed research articles).

discriminated against if their history of addiction became known); *see also* Marks, "Jobs Elude Former Drug Addicts," *Christian Science Monitor* (June 4, 2002) (reporting estimate "that when a recovering addict is honest, he or she will get turned down for a job 75 percent of the time"). And numerous decisions under the Fair Housing Act and the ADA attest to the depth of misunderstanding and hostility toward individuals recovering from chemical dependency. *See, e.g, MX Group,* 293 F.3d at 342; *United States v. Borough of Audubon*, 797 F. Supp. 353 (D. N.J. 1991) (noting "outpouring of public bias against * * * persons recovering from drug or alcohol addiction"), *aff'd* 968 F.2d 14 (3d Cir. 1992).[8]

Congress's determination to protect those recovering from addiction is expressed in 42 U.S.C. § 12114, which, while confirming broad latitude for employer policies relating to employee drug *use*, *see id.* § 12114(a), also imposes a limit on those policies: they may not become a means for discriminating against once-addicted individuals who are "no longer engag[ing] in the illegal use of drugs," *id.* § 12114(b). *Cf. id.* § 12114(b)(3) (allowing adoption of "reasonable policies or procedures * * * designed to ensure that [such individuals are] no longer engaging in the illegal use of drugs"); 136 Cong. Rec. H2443 (1990) (Rangel) (describing provision as striking a "delicate balance").

This ADA's textual distinction reaffirms long-held judgments about the irrationality of excluding individuals who have overcome addiction and the importance of

[8]There is, similarly, no doubt that "[t]he continuing existence of unfair and unnecessary discrimination and prejudice [against individuals history of drug addiction] * * * costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. § 12101(8). *See, e.g.*, NATIONAL INST. ON ALCOHOL ABUSE & ALCOHOLISM, U.S. DEP'T OF HEALTH & HUMAN SERVS., SIXTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH 22 (1987) (estimating annual cost of not employing individuals with addiction at over fifty billion dollars).

encouraging treatment.[9] As the sponsor of the 1978 Rehabilitation Act amendment had explained:

> [M]any recovered alcoholics and drug abusers perform competently and reliably in the full range of tasks, skilled or unskilled, hazardous or not, that make up the job market * * * * A blanket refusal to hire these individuals cannot be justified * * * *[T]he language makes clear that an employer cannot assume that a history of alcoholism or drug addiction * * * poses sufficient danger in and of itself to justify exclusion. Such an assumption would have no basis in fact, and the act does not permit it.

124 Cong. Rec. S37510 (1978) (Williams); *accord Davis v. Bucher*, 451 F. Supp. 791, 797 (E.D. Pa. 1978) ("Whatever undesirable characteristics may attach to current drug use * * * there is absolutely no basis for concluding that those characteristics will in every case persist after the use has ceased"); *see also N.Y. City Transit Auth v. Beazer*, 440 U.S. 568, 596-97 (1979) (Powell, J., concurring in part, dissenting in relevant part) ("there is no rational basis for an absolute bar against the employment of persons who have completed successfully a methadone maintenance program and who otherwise are qualified for employment"); Pres. Proc. No. 7,589, 67 Fed. Reg. 57,123 (Sep. 4, 2002) ("The vast majority of people in recovery are capable individuals who contribute to America's strength") (Commemorating "National Alcohol and Drug Addiction Recovery Month").

Moreover, as the legislative history confirms, Congress understood anti-discrimination protection to be an integral part of the broader "national commitment to encourage all those who need it to come forward for treatment." 135 Cong. Rec. S10774 (Kennedy). Thus, the provision's proponents

[9]Numerous other federal laws draw similar distinctions. *See, e.g.*, 42 U.S.C. § 1437n(e); 21 U.S.C. § 862(c); 28 C.F.R. § 67.635(a)(2)(ii); *see also* 41 U.S.C. § 702(a)(1)(E) ("Drug-Free Workplace" mandates satisfied either by "imposing a sanction * * * or [by requiring] satisfactory participation in a drug abuse assistance * * * program").

repeatedly described § 12114(b)(2), which entitles individuals "participating in a supervised drug rehabilitation program," to the same protection accorded those who "successfully completed" such a program, *id.* § (b)(1), as providing "incentive for treatment," 135 Cong. Rec. S10801 (Simon); *cf. id.* S10795 (Moynihan) ("To turn away from individuals who have recognized their addiction to drugs and alcohol and who have sought, successfully, treatment would indeed be a cruel hoax").[10] As these proponents repeatedly underscored, the aim of encouraging treatment is not an exception to, but rather an essential component of, the Nation's broader commitment to combatting substance abuse.

B. A Policy That Operates In The Manner Petitioner Describes Is Not Lawful *Per Se* Under the ADA

Petitioner does not dispute that the policy it describes would exclude – for life – an applicant who has "successfully completed a supervised drug rehabilitation program" and is "no longer engaging in the illegal use of drugs," *see* 42 U.S.C. § 12114(b)(1) – and would do so based on past drug use while addicted. Nor does Raytheon deny that disqualification under the policy is wholly unrelated to any individualized – or even generalized – assessment about the applicant's ability to perform the job he seeks.

Instead, Raytheon devotes great effort to demonstrating that the policy is not "discriminatory," on the ground that

[10]Congress also recognized a further important link between treatment and employment opportunity: as a growing body of research confirms, workforce participation has a significant, reinforcing effect for recovery. *See* E. Wolkstein, R. Bausch, & G. Weber, *Work As a Critical Component of Recovery* (2000) (available at http://www.med.wright.edu/citar/sardi/workAndRecovery.html); *see also* J. Platt, *Vocational Rehabilitation of Drug Abusers*, 117 PSYCHOLOGICAL BULLETIN 416 (1995); G. Valliant, *What Can Long-term Follow-up Teach Us about Relapse and Prevention of Relapse in Addiction?* 83 BRITISH J. OF ADDICTION 1147 (1988) ("Work provides structure to the addict's life and structure interferes with addiction"); R. Peters, T. Witty & J. O'Brien, *The Importance of the Work Family with Structured Work and Relapse Prevention*, 24 J. APPLIED REHABILITATION COUNSELING 3 (1993).

(1) individuals with disabilities suffer no "disparate treatment" – (a) because applicants are disqualified "based on" past violations of work rules concerning drug use, not their past of addiction; (b) because the ADA was no bar to their prior *termination* for engaging in the same "misconduct"; and (c) because the no-hiring policy applies "no differently" to individuals who used drugs while addicted than to non-disabled individuals who committed acts of "workplace misconduct" during prior employment. Under these circumstances, Raytheon insists, the ADA neither warrants nor permits inquiry into the purposes its policy is intended to serve. The matter is at an "end." Br. at 27.

1. Petitioner's Defense Fails To Respect The Statute's Definition of "Discrimination"

The error of this argument begins with its first premise: that "[d]isability discrimination under the ADA can occur in two ways: disparate treatment and failure to provide reasonable accommodation," *see* Br. at 11. "[D]isparate treatment" may indeed be the "'most easily understood type of discrimination,'" Pet. Br. at 15 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993)), but as this Court has observed, "[t]he statutory definition of 'discriminat[ion]'" under the ADA "covers a number of things an employer might do to block a disabled person from advancing in the workplace," *Chevron U.S.A. Inc. v. Echazabel*, 536 U.S. 73, 86 (2002).

Thus, while Raytheon would have the Court to decide the case as if § 12112 consisted only of two sections – (a) and (b)(5) – the provision expressly defines prohibited "discrimination" to include an employer's use of "standards, criteria, or methods of administration * * * that have the effect of discrimination on the basis of disability," *see* 42 U.S.C. § 12112(b)(3)(A), as well as those which "screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, unless * * * shown to be job-related for the position in question and * * * consistent with business necessity," *id.* § 12112(b)(6). *See also* § 12112(b)(1)

(prohibiting "classifying a job applicant * * * in a way that adversely affects the opportunities * * * of such applicant * * * because of the disability"); *cf.* SG Br. at 2 (acknowledging that "'Discrimination' can take several forms under the ADA").[11]

This statutory language expresses Congress's recognition that many of the practices that limit most severely the opportunities of individuals with disabilities do so unintentionally. *See* 42 U.S.C. § 12101(5); *Board of Trustees, Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring) (noting that "[p]rejudice * * * * may result * * * from insensitivity caused by simple want of careful, rational reflection"). The main thrust of the Act is not to punish employers for acting on bad motives, but rather to open up job opportunities for individuals with disabilities (including those with a history of disability, 42 U.S.C. § 12102(2)(B)). *See Alexander v. Choate*, 469 U.S. 287, 295 (1985) (recognizing that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference"); *id.* at 296-97 ("much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult, if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent").

But no encompassing understanding of "discrimination" is needed to perceive that adverse action triggered by an individual's past drug use when addicted *is* "because of" past addiction. The point is not that prior drug use is

[11]It is not immediately clear why the reasonable accommodation provision is spared the silent treatment Petitioner shows the other types of prohibited discrimination. *See* Pet. Br. App. (reprinting § 12112(b)(5) as part of the "statutory provisions involved" in the case). The provision was not mentioned in the decision below and, – unlike "disparate impact" – Respondent did not invoke it before the district court.

Whether or not these other practices are "'discriminat[ion]' in [the] ordinarily understood sense of that word," Br. at 11, is not controlling, where Congress has defined the term in the statute.

"correlated" with SG Br. at 15, or "somehow caused by," Pet. Br. at 15, past addiction. *It is definitional*. The DSM-IV-R and the United States Code – among many others – refer to *use* as a primary feature of addiction. *See* 42 U.S.C.§ 201(q) ("'drug dependent person' means a person who is using a controlled substance * * * and who is in a state of psychic or physical dependence, or both"); 21 U.S.C. § 802(1); DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994); *see also Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1086 (10th Cir. 1997) (noting that mental illness is typically "diagnosed on the basis of abnormal behavior"); *compare Hazen*, 507 U.S. at 611 (noting that age and years of service are "analytically distinct").[12]

To make this point less clear – and make the case more like those where an employee asserts that a "disability made me do it" – Petitioner strains to describe its denial of Respondent's application as based on some "aggravat[ing] * * * misconduct," Br. at 2, beyond the drug use characteristic of addiction. Thus, Petitioner says that Hernandez was not denied employment based on past drug use or "a drug test," but rather for the past "offense [of] reporting to work with drugs in his system" or "simultaneously working on missiles and using cocaine," Br. at 17.

But given that the Company, before the EEOC, highlighted the portion of its rule dealing with drug test results – and not for example, the one against "being under

[12]Petitioner also exaggerates the significance of evidence that the individual "decisionmaker" may not have been aware of the full details of Hernandez's case. Whether Petitioner could acquit Bockmiller *personally* of any improper motive, there is no contention that her basis for denying Hernandez's application was *unrelated to* his disability – or that Hernandez's drug use while addicted was not relied on *by Raytheon* in reaching the decision. *See Reeves*, 533 U.S. at 141 (impermissible characteristic must have "actually played a role in [the employer's decisionmaking] *process*") (emphasis added); *cf. Holiday*, 206 F.3d at 647 (applying ADA prohibition on "participating in a contractual or other arrangement that has the effect of subjecting a covered entity's qualified applicant or employee to * * * discriminat[ion" 42 U.S.C. § 12112(b)(2)).

the influence * * * of a[n] illegal drug during working time," – and given that cocaine metabolites stay "in [the] system" days and even weeks after use, *see* S. KARCH, DRUG ABUSE HANDBOOK 187 (1998), the "offense" of "coming to work with drugs in [one's] system," turns out to be little more than "taking drugs," Br. 17, while addicted.[13] Moreover, Petitioner has nowhere claimed that the "policy" applies differently to "working on missiles and using cocaine," as against, for example, "reporting for work [in the mail room] with drugs in [one's] system." And if, as Petitioner represents, "termination" is the "invariable" consequence of a positive drug test, Br. at 16, a distinction between being denied a job "based on" a prior drug test or "based on" prior termination is equally hollow. *See infra*.

But even if the distinction between the "offense" of having used drugs while addicted and the status of past addiction were more crystalline, it does not have the determinative significance that Petitioner claims. As numerous courts have held, the inquiry into *discrimination* under the ADA does not "end" when an employer shows reliance on a "technically neutral * * * proxy." *McWright v. Alexander*, 982 F.2d 224, 228 (7th Cir. 1992); *see also Den Hartog*, 129 F.3d at 1086 (rejecting "intrinsic dichotomy between disability and 'disability-caused misconduct'"); *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947 (E.D. Cal. 1990) (exclusion of service dog was disability-based discrimination); *see also Arline*, 480 U.S. at 282 (rejecting argument "that * * * the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant"). Rather, these cases teach, the lawfulness of the excluding the individual with a disability

[13]Although *Amici* inaccurately describe Hernandez as having engaged in "workplace cocaine use," EEAC Br. at 13, the record is clear that his "conduct" was having metabolites indicative of prior cocaine use in his system. Thus, Raytheon's Company Rule and Regulation 7 distinguishes between "use * * * of illegal drug during working time," and **"testing positive for * * * drugs on a *test* required by the Company,"** J.A. 20a (emphasis supplied in Petitioner's EEOC submission).

depends on whether the action can be justified with reference to business necessity. *See Tehan*, 955 F.2d at 517; *accord McDaniel, v. Mississippi Baptist Med. Center*, 869 F. Supp. 445 (S.D. Miss. 1994); *Wallace v. V.A. Admin.*, 683 F. Supp. 758 (D. Kan 1988); *Nisperos v. Buck*, 720 F. Supp. 1424 (N.D. Cal. 1989), *aff'd*, 936 F.2d 579 (9th Cir. 1991); *see also Ambrosino v. Met. Life Ins. Co.*, 899 F. Supp. 438, 440 (N.D. Cal. 1995).[14]

The reasons for requiring further justification are fully relevant here. First, as *Arline* explained, many of the prejudices and stereotypes that disadvantage individuals with disabilities actually relate to attributes of their impairment, rather than the individual's "status." *See McWright*, 982 F.2d at 228 ("discrimination 'because of' handicap is frequently directed at an effect or manifestation of a handicap rather than being literally aimed at the handicap itself") *Den Hartog*, 129 F.3d at 1087 (noting that "[m]ental illness is manifested by abnormal behavior"). Indeed, this is especially true of attitudes toward those with a history of addiction: there is no great animus toward

[14]Although the cited decisions arose under the Rehabilitation Act, the language of that statute, prohibiting decisions based "solely by reason of handicap," was *less* protective than that of the ADA. *See Bragdon*, 524 U.S. at 632.

While this recognition is especially prevalent in disability cases, similar decisions can be found in the many areas of law where "discrimination" is the ultimate issue. *See, e.g., Chalker v. Birmingham & Northwestern Rail Co.*, 249 U.S. 522, 527 (1919) (differential taxation based on location of "chief offices" would "[p]ractically * * * produce discrimination against citizens of other states"); *Fink v. City of New York*, 129 F. Supp. 2d 511 (E.D.N.Y. 2001) (Uniformed Service Employment and Reemployment Rights Act) (considering, and rejecting as "circular[], argument that a "decision to refuse [a returning veteran] a make-up exam had nothing to do with [his] veteran status, but rather, was based simply on the fact that the date for the exam had come and gone"); *Abraham v. Graphics Art Int'l Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (Title VII) (sustaining disparate treatment claim on ground that automatic termination for employees who do not return to work after 10 day leave meant that "oncoming motherhood was virtually tantamount to dismissal" and had a "drastic effect on women employees of childbearing age, an impact no male would ever encounter").

individuals *because they have completed treatment;* the prejudice that most concerned Congress is the false assumption that there is *no difference* between such an individual and a "current use[r]." To treat decisions based on past drug use as non-discriminatory would allow employers to give perfect expression to this prejudice.

Equally important: from the perspective of the member of the class whom Congress protected, a policy that denies employment based on past drug use is no different from one that expressly excluded applicants who "completed a supervised drug rehabilitation program and [are] no longer engaging in the illegal use of drugs," *see* 42 U.S.C. § 12114(b)(1). The same can largely be said for Congress's interest as well: the ADA makes explicit Congress's concern with the "*consequences* of employment practices, not simply the motivation," *Griggs v. Duke Power*, 401 U.S. at 432 (1971) (emphasis in original); *see, e.g.*, 42 U.S.C. § 12101(8). Congress's determination that there is no rational basis for broadly excluding individuals with a history of addiction – and its affirmative commitment to "their full reintegration into society," 135 Cong. Rec. S10774 (Kennedy) – would be for naught if employers could rely on "neutral" past-"misconduct" policies to exclude such individuals. "To permit employers carte blanche to [exclude] employees with [history of addiction] on the basis of [prior drug use] would largely nullify the ADA's protection" of those recovering from addiction, *Den Hartog*, 129 F.3d at 1087; *see also Arline*, 480 U.S. at 282 (noting "unfairn[ess]" of "allow[ing] an employer to * * * use [a] distinction [between condition's effects on others and on employee] to justify discriminatory treatment").

The statutory structure lends further support to the rule that invocation of a "technically neutral" rationale cannot be dispositive. Given that the ADA unambiguously defines as unlawful "discrimination," employer practices that "tend[] to" disqualify applicants with disabilities – by operation of statistical *correlation*, rather than any close causal nexus,

see, e.g., Wallace v. Debron Corp., 494 F.2d 674, 676 (8th Cir. 1974) (challenging policy of discharging employees with multiple wage garnishment for disproportionately burdening African Americans) – it is wholly implausible that a practice that *invariably* excludes members of the protected class *based on* a defining trait of their disability could be lawful without any comparable inquiry.[15]

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[15]Although the Solicitor General, citing the Ninth Circuit's observation that Respondent did not plead a "claim of disparate impact," 298 F.3d at 1037 n.20, urges that the case should be decided – against Respondent – on a "disparate treatment" theory alone, Br. at 17, that proposal is problematic. To the extent that Hernandez's claim might be described as challenging the "effect" of a "neutral policy," it would not require statistical proof of correlation between the ground for disqualification (drug use) and his membership in protected class. *See Mitchell v. Board of Trustees*, 599 F.2d 582, 585 n.7 (4th Cir. 1977) (impact may found based on "judicial notice * * *that a facially neutral policy must in the ordinary course have a disparate impact on a protected group"); *see McWright*, 982 F.2d at 228 (emphasizing that "the distinction between disparate treatment and disparate impact becomes fuzzy at the border"); *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("ultimate legal issue" is the same under both theories); *In re State of Alabama Employment Discrimination Litig.*, 198 F.3d 1305, 1322 (11th Cir. 1999).

Although the complaint did not single out any subsection of § 12112(b), Respondent did closely examine Petitioner's witnesses on the issue of business necessity, *see* J.A. 83a, and in resisting Petitioner's summary judgment motion, he argued that a policy of the kind claimed by Raytheon would have an impermissible disparate impact. The court of appeals itself used phrases such as "screen out," 298 F.3d at 1036, and "business necessity," *id.* at 1037 n.19, that are more commonly associated with the "impact" mode of proof. And it would be obviously inequitable to hold Respondent primarily accountable for delay in developing evidence concerning the effect of Petitioner's "policy." His complaint could not have anticipated that the Company would disavow the explanation it had advanced to the EEOC and substitute a "neutral" policy never invoked before the Commission.

To the extent, however, the Court accepts the Ninth Circuit's characterization of the issue, the proper disposition would not be, as the Solicitor General suggests, to reverse, but rather to dismiss the writ. Because, as the Government recognizes, SG Br. at 17, employer "policies" like the one discussed undeniably *are* amenable to challenge as "discriminatory" under the ADA – albeit under a subsection that Respondent understandably did not plead with great specificity – a

2. The Lawfulness Under the ADA of *Terminating* Employees Who *Engage in* Illegal Drug Use Cannot Settle The Legality of A *No-Hiring* Policy

Far from being self-evident, the proposition that "if the discharge is permissible, then there is no basis for attacking the correlative ban on rehiring," Br. at 17, is squarely at odds with the text of the ADA.

To begin with, the "policy" defended does not relate to the termination of employees who engage in drug use, but rather the hiring of those who "no longer" do. *See National Passenger R.R. v. Morgan*, 536 U.S. 101, 114 (2002) ("Discrete acts such as termination * * * or refusal to hire are easy to identify. Each incident * * * constitutes a separate * * * employment practice"). *See Herman v. City of Allentown*, 985 F. Supp. 569 (E.D. Pa. 1997) ("[t]he action that is the subject of this ADA suit is not the firing of the Plaintiff in the first place. * * * * Defendant had every reason to fire the Plaintiff * * * * The issue in this case is whether the Defendant discriminated against the Plaintiff through its actions that resulted in the failure to rehire the Plaintiff"); *see also McKenzie v. Dovola*, 242 F.3d 967 (10th Cir. 2001).[16]

This difference is of paramount importance, in view of the ADA's consistent, textual distinction between the rights of individuals who "currently engag[e]," § 12114(a), in illegal drug use and those who "no longer" do. *Id.* § 12114(b).

decision by this Court in Raytheon's favor would settle almost nothing. The precedent the Solicitor General cites, *Hazen*, is fundamentally different: unlike the ADA, the statute there in issue, the ADEA, did not include an express congressional directive foreclosing construing "discrimination" as limited to "disparate treatment." *Cf. Adams v. Florida Power*, 535 U.S. 228 (2002) (dismissing writ).

Raytheon's apparent position – that a "policy" could definitively be pronounced "non-discriminatory" in a case where the court declined to consider the full statutory definition – is more plainly untenable.

[16]Notably, Petitioner *already had* a (written) policy comprehensively addressing employees' drug use.

Thus, Petitioner posits that

> [w]hen Hernandez was discharged * * * Hughes held him "to the same standards [of] * * * behavior that [it uniformly applied] to other employees [even though the specific kind of] behavior [in which he engaged was] related to * * * drug use," 42 U.S.C. § 12114(c)(1). And, when it subsequently rejected Hernandez's application * * * it merely enforced its no-rehire rule, a 'qualification standard[] for employment * * * that [it applies] to other' employees who seek to be rehired. *Id.* § 12114(c)(4).

Br. at 24. But this reasoning derives its plausibility from the omission of language in the latter provision that makes clear that its application, like that of § 12114(a), is limited to an "employee who [currently] *engages in* the illegal use of drugs," *id.* (emphasis added). Indeed, this line of argument represents precisely the sort of bootstrapping that Congress intended § 12114(b) to protect against.

Nor is there anything remotely illogical about different legal rules applying to the firing and (re-)hiring of the same individual. On the contrary, such a difference is the inevitable and intended consequence of Congress's "accept[ance of] the concept of a rehabilitated addict," *Southern Mgm't*, 955 F.2d at 922. *Cf. Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (*per curiam*) (pay disparities that had not been unlawful prior to extension of Title VII to State employers were actionable after the effective date, because "each [post-1972] paycheck" was a violation).[17]

3. The ADA Does Not Condone Policies That Thoughtlessly Equate Past Drug Use While

[17]The statute does not declare that terminating the employment of a person with addiction based on current drug use is not "discrimination." Rather, "if the use is current, the ADA does not apply." *Salley v. Circuit City Stores, Inc*, 160 F.3d 977, 980 (3d Cir. 1998); *see id.* ("Congress has obviated the need for us to determine the metaphysical question whether use is part and parcel of an addiction disability"); *compare Den Hartog*, 129 F.3d at 1086 (terminations based on conduct related to disabilities other than addiction must be job-related and justified by business necessity).

Addicted With Other Past "Misconduct"

Nor is it correct to that the no-hiring policy's "even-handedness" – disqualifying applicants who have no disability along with those with a record of addiction – disposes of any ADA objection. As explained above, the statutory language makes it "flatly wrong" to equate facial neutrality with non-discrimination. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 646 (1st Cir. 2000); *See Morton v. U.P.S.*, 272 F.3d 1249, 1258 (9th Cir. 2001) ("[a]n employer may require disabled employees as well as others to meet an across-the-board qualification standard *if it can establish the stringent elements of the business necessity defense*") (emphasis added); *Den Hartog*, 129 F.3d at 1086 ("As a general rule, an employer may *not* hold a disabled employee to precisely the same standards of conduct as a non-disabled employee unless such standards are job-related and consistent with business necessity") (emphasis in original).

But in an important sense, there is nothing inherently "neutral" about a policy judgment that, *for purposes of hiring ineligibility*, prior drug use while addicted is the "same" as "other" prior "aggravated workplace conduct," Br. at 2. In fact, the main reasons Petitioner and *Amici* advance for ineligibility policies are obviously *in*applicable to individuals who, chemically dependent during prior employment, later completed treatment.

First, the premise that in hiring an individual treated for chemical dependency after being dismissed, a company would risk "repeating [its] * * *earlier hiring mistake[]," Br. at 27, would seem to rest on the very stereotypes – that treatment is ineffective and that the applicant's past addiction experience is an indicator of some character flaw – the Congress repudiated. *See McKenzie*, 242 F.3d at 974 ("The conduct that precipitated McKenzie's resignation reflects her illness, not an absence of 'good moral character' that would cause her to fail a background investigation"); *cf.* SG Br. at 16 (the "'primary purpose'" of the ADA, is to

"'eliminate the stereotypical thought processes * * * that far too often bar those with disabilities from participating fully in * * * the workplace'") (quoting *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002)). And while no-rehire policies might "guarantee that there will be no reoccurrence of [drug use]," EEAC Br. at 20, Congress intended that employers would use less draconian – more "reasonable" – means than lifetime bans to pursue that interest. *See* 42 U.S.C. § 12114(b)(3).

And to describe a denial of employment to a fully qualified individual based on drug use while in the grip of addiction (for which he or she later sought treatment) as "*result[ing] from the person's individual merit, as demonstrated by his or her [non]conformance with company rules of conduct,*" SG Br. at 16, is at odds not only with the ADA but with the premises that have guided federal policy concerning addiction and treatment policy for decades.[18]

Finally, it should be noted that both Raytheon policy and the text of the ADA stand against the notion of reflexively treating prior drug use "the same" as prior theft, violence, or sexual harassment. First, the statute's protection for current employees "participating in a supervised rehabilitation program," 42 U.S.C. § 12114(b)(2),

[18]Even less jarring assertions, concerning deterrence and workplace friction, apply with plainly diminished force to individuals who were terminated while addicted. The notion of an individual's being deterred from drug use by the prospect of dismissal with rehiring ineligibility – but emboldened by a rule of firing with the possibility of future consideration *after successfully completing treatment* – is patently incompatible with the impairment of control and judgment that are definitional to the condition of addiction. And there may be less "baggage" in the relationship between newly re-hired former employee and the employer, than Raytheon forecasts. Br. at 27. As one expert has noted (admittedly, using comparably broad generalities):

> People who come back from the grave of addiction are generally so grateful for the support that they received that they throw themselves into their work, becoming models of loyalty and productivity. Attendance problems become nonissues. Attitudes improve. They surprise everyone, including themselves.

J. FEARING, WORKPLACE INTERVENTION 16 (2000).

contemplates that an employee's informing her employer of an addiction problem (with the acknowledgment, implicit or explicit, of *past* violations of company policy concerning "coming to work with drugs in her system") cannot be basis for adverse action – although admission of past theft or violence presumably could be. *Cf.* Pet Br. at 33 (arguing that individuals with disabling addictions have duty to come forward). Moreover, although Raytheon, for purpose of this case, argues that its "unwritten" policy operates across the board, the evidence shows that the Company's *written policy* addressing drug use – and its consequences sanctions – are free-standing. *See* J.A. 81a-86a.

C. The Record Does Not Establish A Business Necessity For Disqualifying Respondent

Although Petitioner and *Amici* offer generalized explanations why an employer might benefit from a policy such as Raytheon's – as well as dire forecasts as to what would happen if the decision below were affirmed, *see, e.g.*, EEAC Br. at 22 (decision below "plac[es] employers in the untenable position of having to consider for rehire former employees who present a known and demonstrated hazard") *but see* 42 U.S.C. § 12113(b)) – the record is barren of *evidence* concerning the business purpose, if any, Raytheon intended its policy to serve. *See* 298 F.3d at 1037 n.19.

Some of the ones advanced most ardently by *Amici* are especially unpromising. As already noted, the assertion that automatic ineligibility rules serve a significant deterrent purpose is counterfactual as applied to the "misconduct" of drug use by an individual in the grips of an addiction. But there is a threshold problem here: benefits of "clear notice" and "strong deterrence," SG Br. at 20-21, cannot be claimed for a policy that is – unlike many of Raytheon's others – *unwritten* and about which Respondent, a 25-year employee apparently never knew.

Proffered safety rationales, *see* SG Br. at 20 (referring to "sensitive or high-risk positions"); *id.* (citing need to "guard other employees and the general public from physical

injury"), suffer similar embarrassments. First, there is no suggestion that the policy applies differently to jobs that are in any way safety-sensitive, *see EEOC. v. Exxon*, 203 F.3d 871, 874-75 (5th Cir. 2000); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 44 (1987) (noting doubt that reinstated employee "would pose a serious threat to the asserted public policy [against 'operation of dangerous machinery by persons under the influence of drugs or alcohol'] in every job for which he was qualified").

Moreover, it is almost inconceivable that a policy that bars individuals, for life, from every position in the Company, could meet a business necessity standard. For example, federal regulations provide that (after an individualized assessment of fitness for duty) individuals previously removed for drug offenses "may be granted unescorted access and assigned duties" in "nuclear power plant protected areas," *see* 10 C.F.R. § 26.27, and Transportation Department regulations likewise provide for drivers who have been treated for chemical dependency to return to "safety-sensitive duty." *See* 49 C.F.R. § 382.121(b)(3); *see also* 14 C.F.R. Pt. 121, App. J (FAA program for restoring licenses of commercial pilots treated for substance abuse).[19]

Indeed, here, too, the generic arguments on Petitioner's behalf proceed with insufficient regard for what the evidence in this case could bear. If Raytheon actually believed that prior drug use made a job applicant a more dangerous

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[19]Thus, even as it recognizes that

> a law enforcement agency *might be able* to show that excluding an individual with a history of illegal drug use from a police officer position was necessary, because such illegal conduct would undermine the credibility of the officer as a witness for the prosecution in a criminal case,

the EEOC cautions that "even in this case, exclusion of a person with a history of illegal drug use might not be justified *automatically* as a business necessity, if an applicant * * * could demonstrate an extensive period of successful performance as a police officer since the time of drug use." EEOC Technical Assistance manual § 8.7 (emphasis added).

employee – a statutorily intolerable premise, in any event – it is impossible to explain why (1) its *written policy* (a) grants individuals who test positive for drugs on the date of their application an automatic right to apply one year later; and (b) allows temporary employees who commit the "offense" of "coming to work with drugs in [their] system" that same right; or (2) why individuals recently dismissed by other employers for doing so would be considered right away. *See* J.A. 81a-86a.

And while other generalized rationales may not be so flatly inconsistent with the record, their adequacy – and even legitimacy – under the statute is doubtful. Congress presumably considered – and surely rejected – arguments that "blanket rules" are more fair than ones where applicants are considered individually, based on their actual ability to do the job, *see PGA Tour v. Martin*, 532 U.S. 661, 668 (2001), and broad (unsubstantiated) assumptions that "friction" might arise or that a covered employer might have "to keep [more] detailed records" are not the sort that could support denying employment to qualified individuals, for life.

To the extent, however, that Petitioner could show that excluding individuals in Respondent's situation is genuinely necessary "to guard against safety hazards, comply with legal requirements, ensure product and service quality, maintain its reputation, and promote an atmosphere that is conducive to retaining good employees," EEAC Br. at 22, nothing in the ADA or the appeals court's remand decision should prevent it from doing so. *See* 42 U.S.C. § 12113.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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DESCRIPTIONS OF *AMICI CURIAE*

Amicus Curiae Betty Ford Center was co-founded by former First Lady Betty Ford and Ambassador Leonard Firestone in 1982 in Rancho Mirage, California. The Center is a private, non-profit treatment center that accepts patients dependent on alcohol and other mood altering chemicals. After completing her own treatment for chemical dependency, Mrs. Ford recognized the need for a treatment center that emphasized the special needs of women, and while the Center treats both women and men who suffer from chemical dependency it saves half of its spaces for women. Each day, more than 750 people are touched by the work of the Betty Ford Center and nearly 300,000 people a year receive education or service from the Center's staff. The Center offers a variety of levels of care, specialty programs and other services for adult patients in a caring and confidential atmosphere. Levels of care include inpatient, day treatment, intensive outpatient, a therapeutic residential community, and focused continuing care. Specialty programs include gender-specific care for women and men and a program for persons who work in safety-sensitive or highly regulated professions, such as pilots, physicians, attorneys and the like. Because addiction affects the entire family, the Center also offers programs for family members, including children. The Betty Ford Center also offers educational programs for health care workers and addiction treatment providers to increase the knowledge and skills in this important field.

Amicus Curiae American Society of Addiction Medicine ("ASAM") is devoted to increasing access to and improving the quality of addiction treatment. ASAM members are physicians from all medical specialties and sub-specialties. They are engaged in private practice, serve as corporate medical directors, work in group practice or other clinical settings, and are also involved in research and education. Through its conferences, continuing medical education

courses, and publications, including the textbook, *Principles of Addiction Medicine (Third Edition, 2002)*, ASAM actively educates the medical community and the public about addiction disorders and diseases, treatment guidelines and practice parameters in the field of addiction medicine. ASAM staunchly opposes policies that create obstacles to or deter persons from receiving substance use treatment and counseling or discriminate against persons in recovery.

Amici Curiae National Council on Alcoholism and Drug Dependence ("NCADD") with its nationwide network of affiliates, provides education, information, and hope in the fight against the chronic diseases of alcoholism and other drug addictions. NCADD, founded in 1944, works to fight the stigma of addiction. NCADD's interest in this case speaks directly to their mission and their 60 year history of working to end discrimination against persons who are addicted to alcohol and other drugs which is a medical condition and not a moral failing.

Amicus Curiae NADDAC The Association for Addiction Professionals (formerly the National Association of Alcoholism and Drug Abuse Counselors, Inc.) is the nation's largest organization of alcohol and drug use disorder professionals. NAADAC has 13,000 members in 47 states. NAADAC's membership reflects a range of health care professionals specializing in addictive disorders. Science has shown that addiction is a brain disease that responds well to treatment, and NAADAC joins this brief because it is deeply concerned that if the decision below is reversed, will hurt our patients and their families. Addiction is a disabling disease, and to discriminate against somebody who has been through treatment for this disease is proscribed by the ADA. The membership of NAADAC believes that the opportunity for employment is an integral part of the continued rehabilitation of individuals and the communities they live in.

Amicus Curiae National Association of Addiction Treatment Providers ("NAATP") was founded in 1978 and represents almost 250 not-for-profit and for-profit providers. NAATP acts as the voice of private alcoholism and drug dependency treatment programs throughout the U.S. and plays a leadership role on behalf of treatment providers in areas such as treatment standards, education, research, and advocacy of legislative, regulatory and reimbursement positions supported by the field. The mission of NAATP is to promote, assist and enhance the delivery of ethical, effective, research-based treatment for alcoholism and other drug addictions. NAATP seeks to accomplish this mission by: (1) providing its members and the public with accurate, responsible information and other resources related to the treatment of these diseases; (2) advocating for increased access to and availability of quality treatment for those who suffer from alcoholism and other drug addictions; and (3) working in partnership with other organizations and individuals that share NAATP's mission and goals.

Amicus Curiae The American Association for the Treatment of Opioid Dependence, Inc. ("AATOD") was founded in 1984 as the Northeast Regional Methadone Treatment Coalition, Inc. Treatment providers joined together to support the legitimacy of methadone maintenance as a valuable treatment for opioid dependence and to increase the availability of comprehensive treatment services to people in need of care. The Northeast Coalition evolved into the national organization, known originally as the American Methadone Treatment Association, Inc., to better coordinate the efforts of methadone treatment providers throughout the United States, and adopted its current name in 2001 to better embrace all forms of opioid pharmacotherapy. AATOD is committed to upholding standards of quality in the comprehensive treatment of opioid dependence and to working with the federal agencies and state substance abuse authorities concerning opioid treatment policy and the development of opioid replacement

pharmacotherapies.

Amicus Curiae National Association on Alcohol, Drugs and Disability ("NAADD") promotes awareness and education about substance abuse among people with co-existing disabilities. NAADD's mission is to create public awareness of issues related to alcoholism, drug addiction, and substance abuse faced by persons with other co-existing disabilities, and to provide a peer approach to enhance access to services, information, education and prevention through the collaborative efforts of interested individuals and organizations nationwide. NAADD connects and supports individuals and organizations with an interest in substance abuse and disability; provides a federal and state government presence to increase opportunities for a high quality research and innovative local programming related to substance abuse and co-existing disabilities; generates and disseminates information about alcohol, drugs and disability; improves access to substance abuse treatment and community services for people with co-existing disabilities; convenes regional and national conferences; and mobilizes collaborative efforts to more efficiently communicate with policy makers.

Amicus Curiae State Associations of Addiction Services ("SAAS") is the only national organization of state alcohol and drug abuse treatment and prevention provider associations. The mission of SAAS is to ensure the availability and accessibility of quality alcohol and other drug treatment, prevention, education and related services throughout the country. SAAS promotes treatment, education, and research in the belief, supported by evidence, that addiction is a treatable disease and that people in recovery can and do lead productive lives in the community. Thirty-two state provider associations currently are members of SAAS, and they in turn represent more than 2000 community-based substance abuse provider agencies and thousands of programs and service projects. Programs represented by the SAAS state associations serve culturally

diverse populations dependent on publicly funded treatment and prevention services.

Amicus Curiae Johnson Institute has led the field in delivering effective prevention, treatment and recovery programs. The Institute's mission is to improve and expand the public's understanding of addiction as a treatable illness, and promote the power and possibility of recovery from alcoholism and other drug addiction. It is the position of the Institute that all individuals and families experiencing the harmful effects of alcohol or other drug addictions can find a path to recovery through early intervention, appropriate care, family involvement and community support.

Amicus Curiae Legal Action Center is a non-profit organization with offices in New York City and Washington, D.C., specializing in legal issues of concern to alcohol, drug and AIDS prevention/treatment communities. The Legal Action Center plays a major role in the policy debate and policy formulation on issues affecting individuals with alcohol and drug problems and their families, working to enact public policies which promote increased access to care for them. The Legal Action Center also provides legal representation to individuals who have faced discrimination because of their alcohol and drug dependencies. The *Hernandez* case raises issues of great importance to the Legal Action Center and the individuals and treatment programs it represents.

Amicus Curiae International Nurses Society on Addictions ("IntNSA") was founded in 1975 to promote evidence-based, comprehensive, state of the art nursing care for addicted patients and their families. IntNSA believes that all nurses must maintain a basic level of knowledge and skills in addictive disorders and that all nurses, regardless of their specialty or practice setting, can contribute to the promotion of healthy lifestyles and early identification of people at risk for developing substance use disorders. In the

same vein, IntNSA is committed to combating misleading stereotypes about addiction and recovery, and to removing barriers to employment, housing and social and medical services confronting many individuals in recovery.